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Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., APPELLANTS,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF MARYLAND

FILED OCTOBER 24, 1962
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IN THE COURT OF APPEALS FOR MARYLAND

SEPTEMBER TERM, 1961

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., Appellants,

v.

J. MILLARD TAWES, GOVERNOR, and BOARD OF STATE CANVASSERS, ET AL., Appellees.

Appendix to Brief of Appellants

[fol. 3]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY, MARYLAND

BILL OF COMPLAINT—Filed August 12, 1960

Petitioners, by their Solicitors, complaining of the defendants, say that:

Jurisdiction and Venue

1. This is a bill of complaint in equity, seeking relief for the denial of rights guaranteed petitioners by the Constitution and laws of the United States and by the Constitution and Declaration of Rights of Maryland.

2. Jurisdiction over the action is conferred on this Court by the Maryland Constitution, as supplemented by the Maryland Code (1957).

3. Jurisdiction to issue the declaratory judgment for which petitioners hereinafter pray exists by virtue of Article 31A, Section 1 of the Code.

4. Venue in this Court is provided by Article 75, Section 75 of the Code.

The Parties to the Action

5. The petitioners:

(a) W. F. Strong is a citizen, taxpayer and eligible voter of Maryland, residing at 301 Hillmoor Drive, Silver Spring, Montgomery County.

(b) Newton I. Steers is a citizen, taxpayer and eligible voter of Maryland, residing at 6601 River Road, Bethesda, Montgomery County.

(c) Francis J. Fagan is a citizen, taxpayer and eligible voter of Maryland, residing at 3605 Buckingham Road, Baltimore County.

(d) John T. Doherty is a citizen, taxpayer and eligible voter of Maryland, residing at 12 Revell Street, Annapolis, Anne Arundel County.

(e) Andrew M. Bristow is a citizen, taxpayer and eligible voter of Maryland, residing at 8168 Glen Gary Road, Baltimore County.

[fol. 4] (f) Samuel Hopkins is a citizen, taxpayer and eligible voter of Maryland, residing at 4302 Wendover Road, Baltimore.

(g) The Maryland Committee for Fair Representation, a non-profit, unincorporated association, having its business address at 4907 Redford Road, Bethesda, Maryland. It brings this action in behalf of all its members. On information and belief, all of the members of the aforesaid Committee are citizens of the State of Maryland, taxpayers and eligible voters of this State. On information and belief, the very great majority of the Committee's members reside either in the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, or in the City of Baltimore.

6. The parties defendant are:

(a) J. Millard Tawes, Governor of the State of Maryland, having his official place of business at the State House, Annapolis, Maryland.

(b) The Board of State Canvassers, an agency of the State of Maryland, created by statute, with offices at the

State House, Annapolis, Maryland, the members of which Board are the Secretary of State, the Comptroller of the Treasury, the Attorney General, the State Treasurer, and the Clerk of the Court of Appeals, all of whom are separately joined in this suit as individual defendants.

(c) Thomas B. Finan, Secretary of the State of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State House, Annapolis, Maryland.

(d) Louis L. Goldstein, Comptroller of the Treasury, and a member of the Board of State Canvassers, having his official place of business in the State Treasury Building, Annapolis, Maryland.

(e) C. Ferdinand Sybert, Attorney General of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State Office Building, Annapolis, Maryland.

(f) Hooper S. Miles, Treasurer of the State of Maryland, and a member of the Board of State Canvassers, having his official place of business in the State Office Building, Annapolis, Maryland.

[fol. 5] (g) James Lloyd Young, Clerk of the Court of Appeals, and member of the Board of State Canvassers, having his official place of business in the Court of Appeals Building, Annapolis, Maryland.

(h) The Board of Election Supervisors of Anne Arundel County is an agency of the State of Maryland, created by statute, the three members of which are appointed by the Governor, defendant Tawes. These are Douglas W. Hantske, Edgar A. Bowen, and Carroll A. Cole. The Board maintains offices in Room 107, Court House, Annapolis, Maryland.

Petitioners' Standing to Complain

7. Petitioner, The Maryland Committee for Fair Representation, is a non-profit, unincorporated association of this State, having the capacity to sue or be sued in its own name,

as provided in Article 23, Section 138 of the Code, and in accordance with Rule 207 of the Rules of Procedure.

8. The other petitioners herein are private persons, all citizens, taxpayers and eligible voters of Maryland, residing in the political subdivisions identified above. They bring this suit to prevent irreparable injury to their Constitutional rights, Federal and State, occurring in the past, and certain to occur in the future (unless declared illegal and enjoined by this Court) as a consequence of certain *ultra vires* actions on the part of the defendants, as hereinafter specified.

CAUSE OF ACTION

9. Article III, Section 2 of the Maryland Constitution provides:

> "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respec- [fol. 6] tively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for."

10. Article III, Section 5 of the Maryland Constitution provides:

> "Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Balti-

more, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

11. No provision of the Maryland Constitution, or any other provision of statute or the law of Maryland, expressly provides for the reapportioning or the revising of the representation in the General Assembly of Maryland which is now established by Article III, Sections 2 and 5, of the Maryland Constitution.

12. Article XIV, Section 1 of the Maryland Constitution provides:

"The General Assembly may propose amendments to this Constitution; provided, that each amendment shall be embraced in a separate bill, embodying the Article or Section, as the same will stand when amended and passed by three-fifths of all the members elected to each of the two Houses by yeas and nays, to be entered on the Journals with the proposed Amendment. The bill or bills proposing amendment or amendments shall be published by order of the Governor, in at least two newspapers, in each County, where so many may be published, and where not more than one may be published, then in that newspaper, and in three newspapers published in the City of Baltimore, once a week for [fol. 7] four weeks, immediately preceding the next ensuing general election, at which the proposed amendment or amendments shall be submitted, in a form to be prescribed by the General Assembly, to the qualified voters of the State for adoption or rejection. The votes cast for and against said proposed amendment or amendments, severally, shall be returned to the Governor, in the manner prescribed in other cases, and if it shall appear to the Governor that a majority of the votes cast at said election on said amendment or amendments, severally, were cast in favor thereof, the Governor shall, by his proclamation, declare the said amendment or amendments having received said majority of votes, to have been adopted by the people of Maryland as part of the Constitution thereof, and

thenceforth said amendment or amendments shall be part of the said constitution. When two or more amendments shall be submitted in manner aforesaid, to the voters of this State at the same election, they shall be so submitted as that each amendment shall be voted on separately."

13. The 1960 populations of the 23 counties and the City of Baltimore, as officially compiled by the United States Department of Commerce, Bureau of Census, are set out in Exhibit A, which is attached to and made a part of this bill of complaint.

14. The 1960 population figures, based on the Federal census taken in 1960, as set out in Exhibit A, show that the present total population of the State of Maryland is 3,072,999. The total combined population of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore is 2,312,485. This is approximately 76% of the total 1960 population of the State. The population of the remaining 19 counties is 760,514, or about 24% of the State's total population.

15. Under the representation now provided for in Article III, Section 2 of the Maryland Constitution, the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the six legislative districts of the City of Baltimore each have one member in the State Senate, for [fol. 8] a total of 10 out of the 29 who comprise that body, or approximately 34% of the total representation in the State Senate.

16. Under the representation established in Article III, Section 5 of the Maryland Constitution, the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the six legislative districts of the City of Baltimore have a total of 60 representatives out of a total of 123 who comprise the House of Delegates, or approximately 49% of the total representation in that House.

17. Attached hereto as Exhibit B and made a part hereof, is a schedule of the receipts and distributions to the various political subdivisions of various State revenues collected

for the fiscal year ending June 30, 1959, as computed by the State Board of Revenue Estimates. The aforesaid schedule shows that the four Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, collectively contributed the following amounts and percentages of the total revenue collected for the fiscal year concerned:

Amount of Revenue Contributed		Percentage of State Total Collected
Income Tax	$58,355,673.47	84%
Sales and Use Taxes	40,565,282.35	73%
Corporation Franchise Tax	433,328.62	83%
Business Licenses	1,505,071.76	70%

18. Attached hereto as Exhibit C and made a part hereof is a schedule containing the current (1960) allocation of motor vehicle registration revenue to the various political subdivisions of Maryland. Exhibit C shows that the four Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore contain, collectively, 20.6% of the total area of Maryland; 32.3% (Baltimore City excluded) of county road mileage in the State; and 72.4% of the motor vehicle registrations. Schedule C also shows, however, that the Counties of Anne Arundel, Baltimore, Prince Georges and Montgomery (excluding Baltimore City) received only 31.9% of the distribution of motor vehicle registration revenues to the political subdivisions of the State.

[fol. 9] 19. Exhibit B, as referred to in paragraph 17 above, shows that the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges received back from the State $3,244,764.78, or 12% of the total allocation to the various political subdivisions of the State of the motor vehicle fuel tax collected in the fiscal year ended June 30, 1959. Exhibit C, as referred to in paragraph 18 above, shows that these four counties contain 46.6% of the total motor vehicle registrations in Maryland.

The Petitioners Are Being Denied Equal Protection Of The Law

20. Section 1 of the Fourteenth Amendment of the Constitution of the United States provides as follows:

> "All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

21. Section 1 of the Fourteenth Amendment prohibits a State, or any agency or officer thereof, from denying, diluting or restricting the equality of voting rights or privileges among classes of otherwise eligible voters similarly situated.

22. Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince Georges and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 Senators).

[fol. 10] 23. Section 1 of the Fourteenth Amendment requires that representation in the House of Delegates be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore are entitled is 92, instead of the 60 Delegates through which they now are represented in that body (assuming no increase in its present membership of 123 Delegates).

24. Sections 2 and 5 of Article III of the Maryland Constitution, as originally proposed by the Constitutional Convention of 1867, and as subsequently adopted and amended, have for one of their prime purposes the creation and continuance of a discrimination against the representation enjoyed in the General Assembly of Maryland on the part of the urban areas of the State, by giving a much higher percentage of representation in both the State Senate and the House of Delegates to the less populous counties than the representation to which those counties would be entitled were the representation in the General Assembly based on population, or reasonably related thereto.

25. Attached hereto as Exhibit D and made a part hereof, is a schedule showing the status of representation now enjoyed in the General Assembly by the various political subdivisions of Maryland. Among other instances of existing malapportionment of representation, as between subdivisions, Exhibit D shows that:

(a) The Counties of Anne Arundel, Baltimore, Prince Georges and Montgomery and the City of Baltimore are the only political subdivisions of the State subjected to under-representation in the General Assembly which, in the House of Delegates, varies in percentage from 3% (in the case of Baltimore City) to 225% (in the case of Baltimore County).

(b) All of the other political subdivisions of the State enjoy over-representation in the House of Delegates, ranging from 23% of over-representation (in the case of Harford County) to 74% (in the case of Somerset County).

[fol. 11] (c) Kent County, with a population of 15,317 has two representatives in the House of Delegates and one representative in the State Senate, whereas Baltimore County, with a population of 490,201 has six representatives in the House of Delegates and one in the State Senate.

(d) Each of the four representatives of Dorchester County in the House of Delegates represents 7,399 persons, while each of the six representatives of Baltimore County in the House of Delegates represents 81,700 persons.

(e) Each of the three representatives of Talbot County in the House of Delegates represents 7,173 persons, while each of the six representatives of Prince Georges County in the House of Delegates represents 59,343 persons.

26. Sections 2 and 5 of Article III of the Maryland Constitution, by failing to base representation in the General Assembly on population, or on some formula approximating the present respective populations of the counties and the City of Baltimore, now illegally discriminate against the eligible voters of Anne Arundel, Baltimore, Montgomery and Prince Georges Counties and the City of Baltimore, including petitioners herein, in violation of the equal protection of the laws provision of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

27. The representation in the General Assembly now provided for in Sections 2 and 5 of Article III of the Maryland Constitution, for the reasons above alleged, also violates the Federal Civil Rights statutes, as found in 28 U.S.C. 1343 (3) and (4), and in 42 U.S.C. 1983.

28. As a consequence of the unconstitutional and otherwise illegal denial of federally guaranteed rights which is visited upon the petitioners and other citizens of Maryland who reside in the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, or in the City of Baltimore, as above alleged, and as a further consequence of the preferential political power which the present illegal system of representation in the General Assembly affords to the other less populous counties of the State, these petitioners and other eligible voters and taxpayers residing in the Counties of Anne Arundel, Baltimore, ~~Montgomery~~ and Prince Georges and the City of Baltimore are suffering [fol. 12] financial injury in being required to contribute a greater share of State revenue and to receive back a lesser pro rata share of such revenue as is returned by the State to the political subdivisions under equalization formulas enacted by the General Assembly than would be required of them if representation in the General Assembly were based on population, or reasonably related thereto, and were the relative weight of the vote of each eligible voter of Maryland roughly equal.

29. The above illegal discrimination in representation in the General Assembly to which the residents of the above referred to four counties and the City of Baltimore are subjected, as specifically alleged in paragraphs 19 through 28 hereof, also violates Article 7 of the Maryland Declaration of Rights.

No Legislative Relief Is Available to Petitioners

30. From 1951 through 1959, at least ten bills were introduced in the General Assembly of Maryland for the purpose of achieving some reapportionment of or change in the representation now provided for in the Maryland Constitution. All of these attempts are identified in Exhibit E, attached to and made a part of this bill. All of the reapportionment proposals thus introduced in the General Assembly in 1951 through 1959 failed of passage because of the opposition of the Delegates and State Senators representing the less populous counties.

31. In February 1959, defendant Tawes, Governor of this State, appointed a Commission, known as the Commission On More Equitable Representation in the General Assembly of Maryland (hereinafter referred to as the Walsh Commission, after the name of its Chairman).

32. On December 31, 1959, the Walsh Commission submitted its final report to the Governor, a copy of which is attached to this bill as Exhibit F and made a part hereof. The Commission recommended a plan of reapportionment under which each County in Maryland would have a minimum delegation of two to the General Assembly; but when the population in any county reached 50,000, such county would be entitled to three delegates; when its population reached 75,000, it would be entitled to four; when it reached [fol. 13] 100,000, it would be entitled to five; when it reached 150,000, it would be entitled to six; and when it reached 200,000, it would be entitled to seven representatives in the House of Delegates. The Walsh Commission also recommended that for each 100,000 increase in population, a county be entitled to one more seat until its delegation in the House of Delegates reached a maximum of ten. The

Committee recommended against any change in apportionment under which any political subdivision of the State would lose any of its present representation in the House of Delegates. Moreover, the Walsh Commission also recommended that no change be made in the representation in the State Senate as now provided for in Article III, Section 2 of the Maryland Constitution.

33. Legislation incorporating the recommendations of the Walsh Commission was introduced in both the House of Delegates and the State Senate of Maryland after it convened for its 1960 session. The legislation as introduced included an amendment to provide for an increase in members to the House of Delegates from Baltimore City. Under the proposed legislation, the following increases in the House of Delegates would have been allowed.

Anne Arundel County,	instead of its present	6 Delegates	7
Baltimore County,	" " " "	6 "	9
Montgomery County,	" " " "	6 "	8
Prince Georges County,	" " " "	6 "	8
Baltimore City,	" " " "	36 "	38
Totals		60	70

34. The legislation incorporating the recommendations of the Walsh Committee, as amended, would have increased the combined representation in the House of Delegates of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore from a total of 60 to 70, or approximately 56% of the total membership of the House of Delegates.

35. Legislation incorporating the provisions of the Walsh Committee, as amended, failed to pass either the House of Delegates or the State Senate, although introduced in both bodies at the 1960 session of the General Assembly.

36. Since Article XIV, Section 1 of the Maryland Constitution requires an affirmative vote of three-fifths (3/5ths) [fol. 14] of the membership of both the State Senate and House of Delegates for a constitutional amendment to be submitted to the voters for adoption or rejection, and the less populous counties of the State control 66% of the

representation in the State Senate and 51% of that in the House of Delegates, it is futile for petitioners to look to the General Assembly and the amendment process provided by Article XIV, Section 1, for relief from the unconstitutional apportionment of representation in the General Assembly to which they are now subjected, and of which they complain herein.

Violations of the State Constitution Confirming The Futility Of Seeking Relief From the General Assembly

37. Article XIV, Section 2 of the Maryland Constitution, as it read in 1950, provided an alternative method of amending that document, stating that:

> "It shall be the duty of the General Assembly to provide by Law for taking, at the general election to be held in the year eighteen hundred and eighty-seven, and every twenty years thereafter, the sense of the People in regard to calling a Convention for altering this Constitution; and if a majority of voters at such election or elections shall vote for a Convention, the General Assembly, at its next session, shall provide by law for the assembling of such convention and for the election of delegates thereto. Each County, and Legislative District of the City of Baltimore, shall have in such convention a number of Delegates equal to its representation in both Houses at the time at which the Convention is called. But any Constitution, or change, or amendment of the existing Constitution, which may be adopted by such Convention, shall be submitted to the voters of this State, and shall have no effect unless the same shall have been adopted by a majority of the voters voting thereon."

38. Article XVII, Section 9 of the Maryland Constitution, as it read in 1950, provided as follows:

> "The vote to be held under the provisions of Section 2 of Article XIV of the Constitution for the purpose [fol. 15] of taking the sense of the people in regard to calling a Constitutional Convention shall be held at

the general election in the year nineteen hundred and thirty, and every twenty years thereafter."

39. Pursuant to the above alleged provisions of the Maryland Constitution, a referendum was held in the 1950 general election with respect to the question of whether a Constitutional Convention should be convened. The proposal to hold a convention was approved by a vote of 200,439 to 56,998.

40. Bills were introduced at the next session of the General Assembly, following the above alleged referendum approving a Constitutional Convention, for the purpose of convening the Convention approved in the 1950 election. That legislation was tabled in the 1951 session. Similar legislation calling for the convening of a Constitutional Convention has been introduced at sessions of the General Assembly, in 1954, 1955, 1957 and 1960. None of the bills have passed which were introduced for the purpose of convening the Constitutional Convention which was approved by the voters in the November 1950 General Election. All are listed in Exhibit G, attached hereto and made a part of this bill of complaint.

41. At the 1960 session of the General Assembly, legislation calling for the convening of a Constitutional Convention passed the House of Delegates, but failed of enactment in the State Senate, after the representatives from the less populous counties, comprising a majority of the General Assembly had invoked parliamentary delays to prevent the proposed legislation from reaching a vote on the merits in the Senate.

42. A Maryland Constitutional Convention convened pursuant to Article XIV, Section 2 of the Maryland Constitution would have the power to propose amendments to the Maryland Constitution, to be submitted to the voters of the State by referenda, including amendments under which reapportionment of the General Assembly of Maryland could be achieved in a manner which would comply with Section 1 of the Fourteenth Amendment of the Constitu- [fol. 16] tion of the United States and Section 7 of the Maryland Declaration of Rights.

43. The representatives of the less populous counties in the General Assembly of Maryland consistently have refused to pass the enabling legislation, as required by Article XIV, Section 2, of the Maryland Constitution, for the purpose of summoning a Constitutional Convention and have publicly stated their apprehension that such a Convention would propose, and a majority of the voters of the State of Maryland would then approve, an amendment or amendments eliminating or revising inequitable and unconstitutional representation in the General Assembly of Maryland, which now exists by virtue of Section 2 and 5, Article III, of the Maryland Constitution.

44. The failure of the General Assembly to approve the legislation providing for a Constitutional Convention, as approved by the voters of the State of Maryland in the November 1950 general elections, violated Article XIV, Section 2 of the Maryland Constitution, as it read and was effective in 1950, and also violates Sections 1, 7 and 45 of the Declaration of Rights of Maryland.

Irreparable Injury to Petitioners

45. In view of the long continued refusal of the General Assembly, where political control is in the hands of the less populous subdivisions, as previously alleged, to either propose an amendment to the Maryland Constitution for the purpose of reapportioning the General Assembly in a manner which complies with the Fourteenth Amendment of the United States Constitution and Article 7 of the Maryland Declaration of Rights, or to permit the convening of a Constitutional Convention for that same purpose, as approved by the voters in the 1950 election, petitioners and other eligible voters of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore have no non-judicial recourse or relief, either through the instrumentality of the General Assembly or through the constitutional amending process provided for by the Maryland Constitution, as previously alleged.

46. Petitioners have no adequate remedy at law to [fol. 17] require the General Assembly to convene a Con-

stitutional Convention, as approved by the voters at the November 1950 general election. Petitioners are suffering irreparable injury: (a) in being denied their right under the Constitution and Declaration of Rights of Maryland to have a Constitutional Convention convened, (b) in being denied their right to have the recommendations of a Constitutional Convention, including proposals to eliminate or reform the unconstitutional system of representation which now prevails in the General Assembly, submitted to the people of the State for their approval, and (c) are suffering further irreparable injury as a consequence of the illegal discrimination in the exercise and effect of their voting rights and the taxation without adequate representation to which they and all other eligible voters of the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Baltimore are subjected by virtue of Sections 2 and 5, Article III of the Maryland Constitution, which provisions, as previously alleged, now violate Section 1 of the Fourteenth Amendment of the Federal Constitution of the United States, and also violate the Civil Rights statutes (28 U.S.C. 1343 (3) and (4) and 42 U.S.C. 1983).

The Ultra Vires Actions Against Which Relief Is Requested

47. Article 33, Section 142(b) of the Code provides that the Board of State Canvassers, upon the basis of the certified copies of the election returns made to them by the boards of the city and county canvassers, shall determine and declare what persons have been elected to office at any State election, including election to the General Assembly of Maryland.

48. Pursuant to Article 33, Section 142(a) of the Code, the present members of the Board of State Canvassers are defendants Finan (Secretary of State), Goldstein (Comptroller), Sybert (Attorney General), Miles (Treasurer), and Young (Clerk of the Court of Appeals).

49. Defendant Finan, as Secretary of State, is required by virtue of Article 33, Section 143(a) to record the certified statements and determinations of election delivered to

[fol. 18] him by the Board of State Canvassers, to publish certified copies thereof, and to transmit a copy of the certified determinations to the Governor, defendant Tawes.

50. Defendant Tawes, as Governor of the State of Maryland, is required by Article 33, Section 143(b), in conformity with the statements and determinations made by the Board of State Canvassers and delivered to him by the Secretary of State, as alleged above, to issue commissions to the candidates elected to office in a State election.

51. Demand has been made in petitioners' behalf, upon both the Governor and the Board of State Canvassers, that they not determine, certify or commission candidates elected at the next general election to be held in November 1962, unless by such time the General Assembly shall have approved and submitted to the people by referendum an amendment to Sections 2 and 5, Article III of the Maryland Constitution, pursuant to which amendment these provisions of the State Constitution would be revised and made to conform with Section 1 of the Fourteenth Amendment of the Federal Constitution. Defendants have refused to agree to that demand, as shown by Exhibit H attached to and made a part hereof.

52. Unless restrained by this Court from doing so, defendant Tawes, as Governor of the State of Maryland, and the Board of State Canvassers, all of the members of which are defendants herein, will perform the above alleged statutory duties in the same manner as they have in the past, and will conduct, approve and issue commissions of election in the 1962 general election on the same basis as has been done in prior elections. Accordingly, defendants, unless enjoined to the contrary, will determine the election of, and issue commissions to, candidates allegedly elected to the General Assembly of Maryland on the same basis as previously has been done, i.e., on the basis of each county and legislative district's present representation in the General Assembly as fixed by Sections 2 and 5 of Article III of the Maryland Constitution, and without regard to the fact that the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges and the City of Balti-

more have not been afforded thereunder the number of [fol. 19] representatives in either branch of the General Assembly of Maryland to which they are entitled under Section 1 of the Fourteenth Amendment of the Constitution of the United States, and without regard to the fact that such unconstitutional apportionment of representation in the General Assembly illegally discriminates against the eligible voters of the above referred to areas, including these petitioners, thereby causing them irreparable injury as citizens of Maryland and of the United States, as hereinbefore alleged.

53. Defendant members of the Board of Election Supervisors of Anne Arundel County, like other local Boards of Election Supervisors of this State, are empowered, pursuant to Article 33, Section 11 of the Code, to have charge of, and conduct, all primary and general elections to the General Assembly of Maryland held within Anne Arundel County. Unless restrained by this Court from doing so, as Exhibit H attests, defendant members of the Board of Election Supervisors of Anne Arundel County and all other local Boards of Election in Maryland will conduct the 1962 general election on the same basis as they have done in previous elections, and will certify as elected to the General Assembly of Maryland only six Delegates from Anne Arundel County and one State Senator, instead of the minimum of eight and two, respectively, to which it would be entitled were representation in the General Assembly based on population.

PRAYERS FOR RELIEF

WHEREFORE, The premises considered, your petitioners pray:

(1) That the Court grant a declaratory judgment holding that Section 2, Article III of the Maryland Constitution violates Section 1 of the Fourteenth Amendment of the United States Constitution.

(2) That the Court grant a declaratory judgment, holding that Section 5, Article III of the Maryland Constitution violates Section 1 of the Fourteenth Amendment of the United States Constitution.

[fol. 20] (3) That the Court grant a declaratory judgment holding that representation in the General Assembly of Maryland, as now established by Sections 2 and 5 of Article III of the Maryland Constitution, also violates the Civil Rights statutes, i.e., 28 U.S.C. 1343 (3) and (4), and 42 U.S.C. 1983.

(4) That the Court grant a declaratory judgment holding that the General Assembly's failure to reapportion the Maryland General Assembly in accordance with a formula which reasonably reflects the present population of the various counties of Maryland and the City of Baltimore violates Section 1 of the Fourteenth Amendment of the United States Constitution, and also violates the Civil Rights statutes (28 U.S.C. 1343 (3) and (4), and 42 U.S.C. 1983), as well as Article 7 of the Declaration of Rights of Maryland.

(5) That the Court grant a declaratory judgment holding that the failure of the General Assembly of Maryland to convene a Constitutional Convention, as approved in the General Election of 1950, violates Section 2, Article XIV of the Maryland Constitution, as it read in 1950, and also violates Articles 1, 7 and 45 of the Declaration of Rights of Maryland.

(6) That the Court permanently enjoin the Board of State Canvassers and the members thereof, as identified herein, from determining, certifying, or in any other way indicating the Board's approval of the election of any candidate to the General Assembly of Maryland in any State election to be held in November 1962 or thereafter (unless such future State election be held on an at large basis), until such time as the General Assembly of Maryland shall have enacted and submitted for a referendum vote by the eligible voters of this State, an amendment or amendments to Sections 2 and 5, Article III of the Maryland Constitution, which would reapportion, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, the representation which is allotted to the various counties and the City of Baltimore in the General Assembly of Maryland.

(7) That the Court enjoin defendant Tawes from issuing commissions of elections to any candidates for the Gen-
[fol. 21] eral Assembly of Maryland in any State election to be held in November 1962, or thereafter (unless such future election be held on an at large basis), until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (6) of these prayers for relief.

(8) That the Court enjoin the Board of Election Supervisors of Anne Arundel County and the members thereof from issuing commissions to any candidates to the General Assembly of Maryland from Anne Arundel County in any State election to be held in November, 1962 or thereafter (unless such future election be held on an at large basis) until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (6) of these prayers for relief.

(9) That the Court retain jurisdiction of this case until such time as the General Assembly of Maryland shall have enacted and submitted to the voters of this State for referendum vote, an amendment or amendments to Sections 2 and 5, Article III of the Maryland Constitution, which proposed amendments would provide for reapportioning, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, and in compliance with Article 7 of the Maryland Declaration of Rights, the representation allotted the counties and the City of Baltimore in the General Assembly of Maryland.

(10) That the defendants pay the cost of this suit.

(11) That the Court grant such other and further relief as to it may seem just and proper.

Maryland Population Figures As Compiled by the U. S. Department of Commerce, Bureau of Census—1960

	1960	1950
Allegany	83,831	89,556
Anne Arundel	206,095	117,392
Baltimore City	921,363	949,708
Baltimore County	490,201	270,273
Calvert	15,661	12,100
Caroline	19,376	18,284
Carroll	52,649	44,907
Cecil	48,346	33,356
Charles	32,575	23,415
Dorchester	29,597	27,815
Frederick	71,985	62,287
Garrett	20,253	21,259
Harford	76,774	51,782
Howard	35,768	23,119
Kent	15,317	13,677
Montgomery	338,675	164,401
Prince Georges	356,061	194,182
Queen Anne's	16,451	14,579
St. Mary's	38,803	29,111
Somerset	19,375	20,745
Talbot	21,519	19,428
Washington	90,185	78,886
Wicomico	48,744	39,641
Worcester	23,395	23,148

[fol. 23]

EXHIBIT B TO COMPLAINT

See Opposite ☞

State of Maryland
BOARD OF REVENUE ESTIMATES
Annapolis

	Income Tax—Resident Individuals		Retail Sales and Use Taxes*	Motor Vehicle Registrations and Fines		Motor Vehicle Fuel Tax		Tax on Recordation of Instruments in Writing		Corporation Franchise Tax	
	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distribution to Baltimore City, Counties and Towns
Baltimore City	$20,707,378.67	$ 5,967,421.40	$22,510,272.41		$ 3,445,101.41		$15,225,168.19	$ 415,575.11	$ 412,281.26	$ 305,909.62	$ 152,897
Allegany County	1,343,543.05	354,770.56	1,397,117.87	N	103,051.24	N	455,421.27	20,166.42	20,166.42	9,830.00	4,915
Anne Arundel County	3,556,964.50	860,319.53	2,237,551.42	o	136,454.27	o	603,041.52	120,996.17	120,994.04	15,260.00	7,580
Baltimore County	14,206,140.59	3,204,673.04	6,794,536.05		261,475.04		1,155,554.26	279,907.50	279,907.50	39,125.00	19,552
Calvert County	137,194.77	33,853.38	150,965.75		37,964.37		167,778.52	6,140.93	6,140.93	1,085.00	542
Caroline County	208,922.61	48,762.14	190,980.76	B	77,437.87	B	342,226.41	4,103.17	4,103.17	1,965.00	982
Carroll County	769,777.46	188,740.47	587,019.44	r	125,759.12	r	555,775.74	19,918.74	19,918.74	4,690.00	2,345
Cecil County	629,811.24	153,867.25	507,399.69	e	71,279.36	e	315,009.67	16,196.01	16,196.01	4,025.06	2,012
Charles County	378,145.29	88,705.70	351,675.90	a	60,035.28	a	265,317.94	12,489.81	12,489.81	3,340.00	1,670
Dorchester County	359,464.14	83,770.21	364,185.29	k	86,594.55	k	282,603.13	7,211.57	7,211.57	3,545.00	1,762
Frederick County	1,070,408.45	248,032.48	1,003,980.11	d	168,311.10	d	743,828.58	24,608.71	24,562.22	9,600.00	4,800
Garrett County	125,245.34	33,699.15	199,797.07	o	109,778.18	o	485,150.12	5,379.65	5,369.20	915.00	457
Harford County	1,265,717.91	298,843.92	821,185.95	w	100,204.45	w	442,840.27	30,957.58	30,957.58	6,020.00	2,970
Howard County	709,235.68	169,184.02	333,541.83	n	52,981.45	n	234,144.49	29,216.62	29,216.62	3,045.71	1,522
Kent County	210,261.85	56,059.42	236,363.39		46,816.50		206,899.32	6,133.62	6,133.62	2,775.00	1,387
Montgomery County	12,210,381.60	2,737,479.40	5,104,998.63		176,811.30		781,394.09	804,736.19	804,394.23	45,844.00	22,862
Prince George's County	7,674,798.11	1,691,980.02	3,917,923.84	A	159,474.17	A	704,774.91	271,760.07	271,760.07	27,190.00	13,577
Queen Anne's County	192,724.42	46,036.07	178,846.16	v	64,722.33	v	286,031.72	7,743.42	7,688.04	1,415.00	707
St. Mary's County	297,034.94	65,550.72	348,988.81	a	52,675.61	a	232,792.87	13,095.41	13,095.41	2,260.00	1,130
Somerset County	136,144.48	36,002.34	148,073.60	i	47,694.12	i	210,777.82	2,978.72	2,977.68	1,710.00	855
Talbot County	456,846.85	123,374.59	445,559.08	l	49,675.99	l	219,536.06	9,972.41	9,972.41	4,430.00	2,177
Washington County	1,726,387.22	412,553.24	1,592,519.08	a	125,566.04	a	554,922.44	29,742.26	29,742.26	14,980.00	7,485
Wicomico County	746,675.74	170,919.96	1,018,135.06	b	104,147.94	b	460,268.00	18,977.70	18,782.81	10,840.00	5,420
Worcester County	260,851.71	68,885.82	471,275.26	l	77,824.04	l	343,933.00	14,281.04	14,281.04	4,745.00	2,355
District of Columbia	—	—	2,170,663.90	e	—	e	—	—	—	—	—
All Other Out of State	—	—	2,227,984.74		—		—	—	—	—	—
Other	211,170.70	—	492,316.46		—		—	—	—	—	—
Total	$89,591,227.32	$17,143,484.83	$55,803,857.55	$20,606,769.28	$ 5,741,835.65	$50,974,854.12	$25,375,280.34	$ 2,172,288.83	$ 2,168,342.64	$ 524,544.33	$ 261,877

* This source of revenue is not shared with the Political Subdivisions.

JULY 5, 1960.

	Recordation of nts in Writing	Corporation Franchise Tax		Alcoholic Beverage Excise Tax (Distilled Spirits)		Business Licenses		Admissions Tax	
	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns	Total Receipts (Less Refunds)	Distributions to Baltimore City, Counties and Towns
1	$ 412,281.26	$ 305,909.62	$ 152,807.31		$ 1,023,000.01	$ 892,237.83	$ 816,842.06	$ 147,324.02	$ 128,286.89
2	20,166.42	9,830.00	4,915.00	N	61,137.95	75,354.18	69,206.34	8,208.68	7,106.62
7	120,994.04	15,260.00	7,580.00	o	133,284.87	115,059.75	103,874.37	116,438.61	101,558.46
0	279,907.50	39,125.00	19,552.50		256,795.95	215,096.13	201,492.66	41,160.61	36,413.33
3	6,140.93	1,085.00	542.50		12,817.00	12,817.16	10,883.44	8,939.69	7,910.88
7	4,103.17	1,965.00	982.50	B	6,454.98	17,810.14	16,343.94	617.87	541.22
4	19,918.74	4,690.00	2,345.00	r	8,552.99	39,667.37	36,672.63	2,180.13	1,898.48
1	16,196.01	4,025.00	2,012.50	e	29,280.15	35,412.49	32,063.40	2,077.99	1,814.44
1	12,489.81	3,340.00	1,670.00	a	33,448.21	28,707.86	24,605.09	27,868.37	24,489.96
7	7,211.57	3,545.00	1,762.50	k	10,226.53	30,905.91	25,522.92	1,322.81	1,154.23
1	24,562.22	9,600.00	4,800.00	d	39,595.58	62,988.14	58,303.72	5,556.01	4,847.89
5	5,369.20	915.00	457.50	o	—	16,930.64	15,487.64	949.80	835.78
3	30,957.58	6,020.00	2,970.00	w	17,349.54	50,707.21	46,795.93	7,011.04	6,135.90
2	29,216.62	3,045.71	1,522.85	n	24,133.06	18,798.82	17,360.72	14,870.56	13,396.01
2	6,133.62	2,775.00	1,387.50		8,133.30	17,629.11	16,044.19	1,602.82	1,420.33
9	804,394.23	45,844.00	22,862.00		120,421.86	144,131.44	135,400.90	25,424.50	22,273.60
4	271,760.07	27,190.00	13,577.50	A	182,638.81	138,456.61	128,445.46	55,616.27	48,512.70
2	7,688.04	1,415.00	707.50	v	15,052.83	17,874.02	14,069.53	464.40	407.34
1	13,095.41	2,260.00	1,130.00	s	30,348.57	27,403.05	22,680.84	138,945.80	121,413.25
2	2,977.68	1,710.00	855.00	i	8,643.41	17,806.56	13,629.13	590.64	517.47
	9,972.41	4,430.00	2,177.50	l	29,416.05	29,017.81	24,872.41	1,572.07	1,377.62
6	29,742.26	14,980.00	7,485.00	a	56,144.41	88,029.05	80,829.97	11,870.56	10,157.56
4	18,782.81	10,840.00	5,420.00	b	20,853.79	54,950.35	50,572.93	3,563.72	3,116.93
1	14,281.04	4,745.00	2,355.00	l	19,395.39	31,710.94	28,591.79	11,981.30	10,824.12
	—	—	—	e	—	—	—	—	—
	—	—	—		—	—	—	—	—
	—	—	—		—	—	—	—	—
	$ 2,168,342.64	$ 524,544.33	$ 261,877.16		$ 6,470,300.02	$ 2,147,125.67	$ 2,179,493.57	$ 1,990,592.21	$ 636,158.27	$ 556,411.01

[fol. 24]

EXHIBIT C TO COMPLAINT

See Opposite ☞

Comparison of Allocation of Motor Vehicle Registration to Maryland Political Subdivisions With Population, Road Mileage and Motor Vehicle Registrations

County	Area		1960 Pop.		County Road Mil'g		Motor Vehicle Regis.		Present Allocation of 20% Share	
	Sq. Mi	Pct.	x1000	Pct.	Miles	Pct.	Number	Pct.	Amount	Pct.
Allegany	428	3.96	83.8	2.7	667.15	4.5	30,387	2.82	558,472.51	4.5
Anne Arundel	458	4.34	206.1	6.7	883.40	6.0	64,503	6.00	739,495.79	5.9
Baltimore	638	6.04	490.2	15.9	1,692.78	11.5	178,431	16.58	1,417,029.30	11.4
Calvert	244	2.31	15.7	0.5	245.78	1.7	5,337	.50	205,742.89	1.7
Caroline	325	3.07	19.4	0.6	501.33	3.4	9,995	.93	419,664.28	3.4
Carroll	456	4.32	62.6	1.7	814.16	5.5	23,561	2.19	681,534.86	5.5
Cecil	386	3.65	48.3	1.6	461.46	3.1	16,748	1.56	386,289.03	3.1
Charles	502	4.75	32.6	1.1	326.73	2.2	11,084	1.03	325,353.22	2.6
Dorchester	688	6.51	29.6	1.0	560.61	3.8	12,274	1.14	469,287.68	3.8
Frederick	670	6.34	72.0	2.3	1,089.64	7.4	28,568	2.66	912,139.68	7.3
Garrett	668	6.32	20.3	0.7	710.70	4.8	7,747	.72	594,928.30	4.8
Harford	475	4.50	76.8	2.5	648.72	4.4	27,282	2.54	543,044.72	4.4
Howard	251	2.37	35.8	1.2	343.00	2.3	13,618	1.27	287,125.94	2.3
Kent	308	2.91	15.3	0.5	240.21	1.6	6,943	.65	253,716.82	2.0
Montgomery	506	4.79	338.7	11.0	1,144.67	7.8	131,318	12.21	958,205.39	7.7
Prince Georges	496	4.69	356.1	11.6	1,032.43	7.0	126,770	11.78	864,249.08	6.9
Queen Anne's	408	3.87	16.5	0.5	419.01	2.9	7,105	.66	350,754.05	2.8
St. Mary's	420	3.98	38.8	1.3	341.02	2.3	9,934	.92	285,468.48	2.3
Somerset	378	3.57	19.4	0.6	308.77	2.1	6,921	.64	258,471.94	2.1
Talbot	331	3.13	21.5	0.7	321.60	2.2	10,264	.95	269,211.97	2.2
Washington	471	4.46	90.2	2.9	812.91	5.5	36,593	3.40	680,488.48	5.5
Wicomico	395	3.73	48.7	1.6	674.25	4.6	21,782	2.02	564,415.94	4.5
Worcester	589	5.58	23.4	0.7	503.83	3.5	10,904	1.01	421,757.04	3.4
Baltimore City	86	.81	921.4	30.0			277,797	25.82		
Total			3,083.0		14,744.16				12,446,846.39	

[fol. 25]

EXHIBIT D TO COMPLAINT

See Opposite ☞

STATUS OF REPRESENTATION OF COUNTIES AND CITY OF BALTIMORE IN THE GENERAL ASSEMBLY

County	1960 Population	Delegates	Each Represents	Deviation From Mean (25,065)	Percent of Deviation	Percent of Fair Value of Vote for: Delegate	Senator	Population Growth 40–50	50–60
Allegany	83,831	6	13,972	11,093	44	179	121	3.0	−6.0
Anne Arundel	206,095	6	34,349	−9,330	−37	73	51	71.7	74.5
Baltimore	490,201	6	81,700	−56,635	−225	30	22	73.4	81.5
Calvert	15,661	2	7,831	17,284	69	321	680	15.4	34.5
Caroline	19,376	2	9,688	15,077	60	258	547	3.9	6.0
Carroll	52,649	4	13,162	11,903	47	192	220	15.0	17.1
Cecil	48,346	3	16,288	8,777	35	156	218	44.8	26.3
Charles	32,575	2	16,093	7,850	31	153	329	32.9	37.6
Dorchester	29,597	4	7,399	17,666	71	338	358	−0.7	.6.5
Frederick	71,985	6	11,997	13,088	52	208	147	8.7	15.5
Garrett	20,253	3	6,751	18,314	73	368	522	−3.3	−4.7
Harford	76,774	4	19,193	5,872	23	131	138	47.7	48.3
Howard	35,768	2	17,884	7,181	29	139	296	34.6	55.0
Kent	15,317	2	7,658	17,407	69	325	692	1.6	12.4
Montgomery	338,675	6	56,446	−31,381	−125	44	41	95.9	106.0
Prince Georges	356,061	6	59,343	−34,278	−138	42	30	117.0	83.5
Q. Anne's	16,451	2	8,225	16,840	67	305	642	0.7	7.7
St. Mary's	38,803	2	19,401	5,664	23	129	273	99.0	33.3
Somerset	19,375	3	6,458	18,612	74	385	547	−1.0	−6.8
Talbot	21,519	3	7,173	17,892	71	348	493	3.4	10.8
Washington	90,185	6	15,014	10,051	40	167	119	14.6	13.1
Wicomico	48,744	4	12,186	12,879	51	205	218	14.8	22.9
Worcester	23,395	3	7,798	17,267	69	321	452	9.0	1.9
Baltimore City	921,363	36	25,593	−527	−3	98	69	10.5	−2.8
State	3,082,999	123	25,065					28.6	31.1

(29 Senators: one for each 106,310 population)

[fol. 26]

Exhibit E to Complaint

Reapportionment Legislation Introduced in the General Assembly of Maryland, 1951 through 1959*

1951

1. S.B. 403, introduced on March 20, 1951, and calling for a new legislative district for Baltimore City. Referred to the Senate Committee on Judicial Proceedings. Favorable report rejected by the Senate on March 26, 1951.

1952

2. No reapportionment bills were introduced at this session of the General Assembly.

1953

3. H.B. 845, introduced on March 26, 1953, and to provide for the total House membership for Baltimore City. This bill died in the House Judiciary Committee.

1954

4. House Resolution 31, introduced on February 22, 1954, and calling for the Board of Public Works to name a commission to study reapportionment. The resolution was adopted on February 26, 1954.

5. H.B. 69, introduced on February 10, 1954, and providing that the Montgomery County representation in the House of Delegates be increased from 6 to 9 members. This bill died in the House Rules Committee.

6. H.B. 75, introduced on February 10, 1954. The bill called for reapportionment of the Senate, increasing the membership thereof from 29 to 40 members, and also provided for a change in the formula for representation in the House of Delegates. This bill died in the House Judiciary Committee.

[fol. 27] 1955

7. No reapportionment bills were introduced at this session of the General Assembly.

1956

8. No reapportionment bills were introduced at this session of the General Assembly.

1957

9. H.B. 328, introduced on February 4, 1957, and to provide for a new method of determining membership in the House of Delegates. The bill died in the House Judiciary Committee.

1958

10. H.B. 161, introduced on February 24, 1958, and to provide for reapportionment of the Senate. The bill died in the House Judiciary Committee.

1959

11. H.B. 50, introduced on January 20, 1959, and calling for the creation of additional legislative districts in the larger counties. The bill died in the House Judiciary Committee.

12. H.B. 243, introduced on February 9, 1959, and to provide for seven legislative districts for the City of Baltimore. It died in the House Judiciary Committee.

13. S.D. 131, introduced on January 23, 1959. The proposed legislation provided for legislative districts in the counties. The bill died in the Senate Judicial Proceedings Committee.

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* The above stated information was provided by the Office of Research of the Legislative Council of the State of Maryland.

[fol. 28]

EXHIBIT F TO COMPLAINT

FINAL REPORT OF THE COMMISSION ON MORE EQUITABLE REPRESENTATION IN THE GENERAL ASSEMBLY OF MARYLAND

December 31, 1959

Address correspondence to:
Department of Legislative Reference,
Room 311, City Hall,
Baltimore 2, Maryland.

Honorable J. Millard Tawes,
Executives Offices,
Annapolis, Maryland.

DEAR GOVERNOR:

The 1958 Democratic State Platform contained the following statement with relation to providing More Equitable Representation in the General Assembly of Maryland, namely:

> The provisions in the Maryland Constitution for representation in the General Assembly of Baltimore City and the twenty-three counties have long been obsolete. The recent large increases in the population of Baltimore, Montgomery, Prince George's and Anne Arundel Counties, among others, have made it clear that, in addition to Baltimore City's claim for more equitable representation in the General Assembly, a general revision of the basis of representation should no longer be postponed. We pledge the next Democratic Governor of Maryland to appoint a Commission of outstanding and representative citizens of the State to make a comprehensive study of the subject, and to devise a plan for submission to the General Assembly, and to the people through a Constitutional amendment designed to provide more equitable representation in [fol. 29] the General Assembly for Baltimore City and for the counties of the State.

In accordance with the foregoing pledge, you appointed a "Commission on More Equitable Representation in the General Assembly of Maryland" in February 1959, and after studying this always difficult problem to the best of its ability, the Commission so appointed by you, herewith submits its final report, which Final Report differs in some particulars from the Report previously submitted under date of October 10, 1959.

It might be said at the outset that the problem of proper representation in State legislative bodies is not limited to Maryland but is of general concern throughout the Country. Our investigation shows that between 1941 and 1950 twenty-six States reapportioned their Legislatures, and that since 1950 fifteen States have reapportioned. Some States require reapportionment at stated intervals, in thirty-seven States the Legislature has the power to reapportion, and a few States give some ex-officio agencies or permanent Commissions, the authority to act if the Legislature fails to act. The plans adopted vary widely and are too numerous to set out in this report. Furthermore, we do not believe that a consideration of these plans would be particularly helpful, as any practical solution of this problem in Maryland must necessarily take into consideration the provisions of our own Constitution and the traditional method of representation established by those provisions, but we deemed it proper to point out that the great majority of the States have found the problem both difficult and continuing.

Maryland Constitutional Provisions

Representation in the Legislature was provided for by Sections 1 to 5 of Article III of the Constitution of 1867, and except as hereinafter noted, these provisions are still in effect.

Section 1 provided that the Legislature should consist of two branches, a Senate and a House of Delegates, and should be styled the General Assembly of Maryland.

[fol. 30] Section 2 provided that each County, and each of the three Legislative Districts into which Baltimore City was then divided, should be entitled to one Senator.

Section 3 provided specifically for the number of members of the House of Delegates to which each County and each Legislative District should be entitled until the taking of the 1870 National Census, and under this Section the 21 Counties then in existence had 68 members and Baltimore City had 18.

Section 4 provided that after the 1870 Census, each County, based on its population, should have the following representation.

18,000 or less	2 delegates
Over 18,000 and less than 28,000	3 delegates
28,000 and less than 40,000	4 delegates
40,000 and less than 55,000	5 delegates
55,000 and upwards	6 delegates and no more

The Section also provided that each Legislative District in Baltimore City should be entitled to the number of Delegates to which the largest County shall be entitled, and it gave the General Assembly authority to change the boundaries of the City Districts from time to time so as to make them approximately equal in population.

Section 5 of Article III provided that after each Federal Census the Governor of Maryland should apportion the membership of the House of Delegates in accordance with the standards set up in Section 4.

In 1900 the Constitution was amended to give Baltimore City four Legislative Districts, and in 1922 it was further amended to give Baltimore City six Legislative Districts, so that the City now has six State Senators and thirty-six members of the House of Delegates, which is just twice the representation it had under the original Constitution of 1867.

In 1950, as the result of a suggestion made by a Committee on More Equitable Representation appointed by Governor William Preston Lane, Jr., a Constitutional amendment was adopted which froze representation in the House of Delegates on the basis of the representation established under the Federal Census of 1940.

The Constitution of 1867 provided a minimum of 2 Dele- [fol. 31] gates for each County, with increases up to 6, based on gains in population up to 55,000, but made no

provision for any increases in representation after a County reached 55,000. The obvious purpose of the 1950 amendment was to prevent the smaller Counties from gaining increased representation at the expense of the larger Counties, as under the Constitution a County was entitled to a maximum of six Delegates when its population reached 55,000, but acquired no further representation no matter how large it might become.

The following table shows the population of each County and of Baltimore City under the Federal Census of 1870, 1940 and 1950, and the State Department of Health estimates of these populations for 1959, together with the number of Delegates to which each County and the City were entitled under the 1870 and 1940 Census. The representation under the 1940 Census is the present representation in the House of Delegates.

There is also attached to this Report a table showing the population figures for each County and for Baltimore City from 1870 to 1950, and the State Department of Health estimates of these populations for 1959 and 1960.

[fol. 32]

See Opposite ☞

TABLE

FEDERAL CENSUS 1870, 1940 AND 1950,
STATE DEPARTMENT OF HEALTH ESTIMATED 1959 POPULATION

	Population of 1870	Number of Delegates	Population of 1940	Number of Delegates	Population of 1950	Population of 1959 (Estimated)
Allegany	33,536	4	86,973	6	89,556	82,000
Anne Arundel	24,457	3	68,375	6	117,392	194,000
Baltimore	63,142	6	155,825	6	270,273	447,000
Calvert	9,865	2	10,484	2	12,100	14,700
Caroline	12,101	2	17,549	2	18,234	19,400
Carroll	28,619	4	39,054	4	44,907	54,500
Cecil	25,874	3	26,407	3	33,356	48,500
Charles	15,738	2	17,612	2	23,415	31,200
Dorchester	19,485	3	28,006	4	27,815	28,200
Frederick	47,572	5	57,312	6	62,287	70,000
Garrett (founded 1872) 1880	12,175	2	21,981	3	21,259	20,000
Harford	22,605	3	35,000	4	51,782	70,800
Howard	14,150	2	17,175	2	23,119	30,500
Kent	17,102	2	13,465	2	13,677	15,800
Montgomery	20,563	3	83,912	6	164,401	312,000
Prince George's	21,138	3	89,490	6	194,182	350,000
Queen Anne's	16,171	2	14,476	2	14,579	15,400
St. Mary's	14,944	2	14,626	2	29,111	39,700
Somerset	18,190	3	20,965	3	20,745	21,300
Talbot	16,137	2	18,784	3	19,428	20,200
Washington	34,712	4	68,838	6	78,886	90,000
Wicomico	15,802	2	34,530	4	39,641	50,200
Worcester	16,419	2	21,245	3	23,148	25,000
Total Counties	513,295	66	962,144	87	1,393,293	2,050,400
Baltimore City	267,354	18	859,100	36	949,708	989,000
State of Maryland	780,649	84	1,821,244	123	2,343,001	3,039,400

[fol. 33]

Present Inequities in Representation

It is obvious from the figures in the foregoing table that representation in the House of Delegates is grossly inequitable, particularly in the cases of the four largest Counties, Baltimore, Prince George's, Montgomery and Anne Arundel.

For example, according to the estimates made by the State Health Department, Baltimore County, with six Delegates, had a 1959 population of 447,000, which is one Delegate for each 74,500 people. Prince George's County, with six Delegates, had a 1959 population of 350,000, which is one Delegate for each 58,333 people. Montgomery County, with six Delegates, had a 1959 population of 312,000, which is one Delegate for each 52,000 people; and Anne Arundel County, with six Delegates, had a 1959 population of 194,000, which is one Delegate for each 32,333 people.

On the other hand, Calvert County with two Delegates, had a 1959 population of 14,700, which is one Delegate for each 7,350 people. Queen Anne's County, with two Delegates, had a 1959 population of 15,400, which is one Delegate for each 7,700 people. Kent County, with two Delegates, had a 1959 population of 15,800, which is one Delegate for each 7,900 people. Dorchester County, with four Delegates, had a 1959 population of 28,200, which is one Delegate for each 7,050 people. And there are numerous other examples of unequal representation, some of which will be set out later in this Report.

Suggested Plan for More Equitable Representation in the Maryland Legislature

Preliminary Discussion

For the reasons hereinafter set forth, the Commission has agreed on the following matters:

1. No change in the representation in the State Senate is recommended. The present representation of one State Senator from each County and of one State Senator for each of the six Districts in Baltimore City, is based on Senate representation from localities, rather than on a

[fol. 34] population basis and as the Senate of the United States has representation on a similar basis, and such representation is traditional in Maryland, the Commission believes that it would be inadvisable to recommend any change so far as the State Senate is concerned.

2. No immediate change is recommended with regard to the representation of Baltimore City in the House of Delegates. On the basis of the City's present population, as compared to the total population of the Counties, the City of Baltimore as a whole now has a larger percentage of representation in the House of Delegates than it had in 1870, under the provisions of the Constitution of 1867. The 1870 census gave the City a population of 267,354, while the Counties then had a total population of 513,295, making a total State population of 780,649. Of this total, Baltimore City had approximately 34.25 per cent, and the counties had approximately 65.75 per cent. The City then had eighteen members of the House of Delegates, while the Counties had sixty-six members, so that the City had approximately 21.5 per cent of the House members, and approximately 34.25 per cent of the State's population.

The 1959 estimated population of the City is 989,000 and the 1959 estimated total population in the Counties is 2,050,400, making a total State population of 3,039,400. The City's percentage of this total is approximately 32.35 per cent, which is two per cent less than the City had in 1870. On the other hand, the City as a result of two constitutional amendments, now has thirty-six members of the House of Delegates as against eighty-seven County members, and the City's percentage of the total House membership of 123 is slightly over twenty-nine per cent. It thus appears that with two per cent less of the population, the City has 7½% more of the representation in the House than it had in 1870, and even if all of the additional eighteen members hereinafter recommended come from the Counties, the City will still have 25.5% of the total membership, and this exceeds the 21.5% which it had in 1870. Furthermore, the County population as a whole is increasing more rapidly than the City population. The State Health Department estimates a total State gain of about 75,000 in 1960 over

[fol. 35] 1959, and of this gain only 2,500 is credited to the City, while the County gain will be over 70,000.

However, there are inequities among the six Districts in the City. The Legislature has the authority to correct this situation under the present Constitution, and we recommend that the representatives of the City in the Legislature submit a plan to correct the present inequities in the City Districts, and if they do so, and the plan is approved by the Legislature, we believe any District which acquires the necessary population in the future should secure the same additional representation recommended for the Counties.

The Commission has decided that it would be impractical to suggest any decrease in the present representation of any County in the House of Delegates. If any decreases were recommended, the smaller Counties would necessarily be affected. There are seven Counties with two Delegates, five Counties with three Delegates, and four Counties with four Delegates, making a total of sixteen. Nearly all of these would lose representation under any plan providing for decreases of representation based on a population basis, and it is also probable that some of the seven Counties which now have the maximum of six Delegates would also lose representation. A constitutional amendment requires a three-fifths vote of both Houses of the Legislature, and this means eighteen votes in the State Senate, so that twelve of the twenty-nine State Senators can prevent the approval of any Constitutional amendment. The Commission believes that it would be impossible to secure eighteen affirmative votes in the Senate even if as many as twelve of the Counties were going to lose any of their present representation, and that any logical plan calling for a decrease in representation would involve at least twelve Counties and probably more. In this connection we also wish to mention that representation in the House of Delegates, based solely on a population basis, would require decreases in membership for more than half of the Counties, which we think impossible of accomplishment, or would result in a major increase in the membership of the House of Delegates, which we do not deem advisable.

It should also be noted that there is a great diversity of [fol. 36] interests in Maryland, including farming, truck farming, tobacco growing, horse breeding and cattle raising, timber, poultry, oysters and other seafoods, canning, coal mining, orchards, industrial plants, and the large industrial and mercantile enterprises of Baltimore City, together with the City's port and shipping interests. These interests are located in various sections of the State, there is often a considerable difference even in adjoining Counties, and it has been traditional in Maryland to have each County and Baltimore City represented in the Legislature so that these diversified interests may all be properly considered in enacting the laws of the State.

Proposed Plan for More Equitable Representation in the House of Delegates

If the above tentative conclusions of the Commission are approved, the only way in which any improvement can be made is to give increased representation to the larger counties, and, under certain circumstances, to some of the Baltimore City Districts, and in considering this matter, attention must be given to the maximum number of members that should compose the House of Delegates.

There are now 123 members, and it is believed that there are only fifteen States which have a larger membership. Furthermore, the physical size of the present House of Delegates chamber in the State House must be considered, because this chamber will not accommodate very many more members.

The Commission suggests that the maximum number of members be limited to 141, it being thought desirable to have an uneven number to avoid tie votes, and this would mean a total increase of 18 members.

The four largest counties are Baltimore, with an estimated 1959 population of 447,000; Prince George's with an estimated 1959 population of 350,000; Montgomery with an estimated 1959 population of 312,000; and Anne Arundel County with an estimated 1959 population of 194,000. All of these counties now have the present maximum representation of six Delegates each, and it is obvious that if the

increase in the membership of the House of Delegates is to be limited to 18 additional members, such increase, if [Vol. 37] granted, must be based on very substantial increases in population. The Commission suggests that no County and no City District have more than six Delegates until its population reaches 200,000, and that thereafter an increase of 100,000 be required for each additional Delegate up to a maximum of ten, and it further suggests that this plan apply to the Baltimore City Districts only after the populations of these Districts have been made approximately equal by the Legislature.

This suggestion would give increased representation to the above four largest Counties after the 1960 Federal Census is completed, the City of Baltimore could secure additional Delegates at a later date, and it is believed that consideration should also be given to granting increased representation to some smaller Counties whose populations are growing more rapidly than are those of the remaining Counties.

In accordance with the foregoing views, the following plan is proposed:

PLAN RECOMMENDED

Any County now having two Delegates shall be entitled to three Delegates when its population reaches 50,000.

Any County which has or acquires three Delegates shall be entitled to four Delegates when its population reaches 75,000.

Any County which has or acquires four Delegates shall be entitled to five Delegates when its population reaches 100,000.

Any County which acquires five Delegates (no County now has this number) shall be entitled to six Delegates when its population reaches 150,000.

Any County which has or acquires six Delegates shall be entitled to seven Delegates when its population reaches 200,000.

Any County which becomes entitled to seven Delegates shall be entitled to eight Delegates when its population reaches 300,000.

Any County which becomes entitled to eight Delegates shall be entitled to nine Delegates when its population reaches 400,000.

[fol. 38] Any County which becomes entitled to nine Delegates shall be entitled to ten Delegates when its population exceeds 500,000.

After the City of Baltimore has been re-districted so that the population of each District will be about the same, any District acquiring a population of 200,000 shall be entitled to seven Delegates, any District acquiring a population of 300,000 shall be entitled to eight Delegates, any District acquiring a population of 400,000 shall be entitled to nine Delegates, and any District whose population exceeds 500,000 shall be entitled to ten Delegates.

No County nor District shall have more than ten Delegates.

The population of each County and District shall be determined by the Federal Census and after each such census has been published, the Governor shall, within thirty days after such publication, declare by proclamation the number of Delegates to which each County and District is entitled as determined by such census under the above plan. If any Federal Census does not give the population by Districts in Baltimore City, the Governor shall have the power to determine the population of each District, and in doing so, the Governor shall use the Census figures for the City Wards and blocks, and the Governor's determination of the population of each District shall be final.

The maximum membership of the House of Delegates shall be 141, and when that number has been reached no further members shall be added. Should the number to be added under any future census exceed this maximum, the number required to achieve said maximum shall be given to the Counties and Districts whose population growth since the previous census has been the largest.

COMMENTS ON ABOVE PLAN

According to the estimates of the State Health Department, the 1960 population of Baltimore County will be 465,000, that of Prince George's will be 370,000, that of

Montgomery County will be 325,000, and that of Anne Arundel County will be 205,000. If the 1960 Federal Census shows that these figures are approximately correct, Baltimore County, under the above plan, would get nine Delegates, an increase of three; Prince George's and Mont- [fol. 39] gomery Counties would each get eight Delegates, an increase of four; and Anne Arundel County would get seven Delegates, an increase of one. This would make a total increase of eight Delegates under the 1960 census, and adding this increase to the present membership of 123 in the House of Delegates, would give a total membership of 131.

Based on the growth of the above four Counties during the past twenty years, it seems quite probable that under the 1970 census Baltimore County will become entitled to the maximum of ten Delegates, a gain of one, that Prince George's County will also become entitled to the maximum of ten Delegates, a gain of two, that Montgomery County will become entitled to nine Delegates, a gain of one, and that Anne Arundel County will become entitled to eight Delegates, a gain of one, making six additional Delegates, and bringing the total membership of the House to 137.

In addition, while the population of Baltimore City is increasing at a much less rapid rate than that of many of the Counties, it seems likely that some of the City Districts would become entitled to additional representation by 1970, and certainly some would by 1980.

There are also five other Counties whose population gains in recent years and their locations near Baltimore or Washington, indicate that they may become entitled to additional representation in 1970 or in 1980 under the above plan, and these Counties are Cecil, Charles, Harford, Howard and St. Mary's.

Under the 1950 census, Cecil County had a population of 33,356 and its estimated 1960 population is 49,500. Cecil County now has three members of the House of Delegates, and under the proposed plan it would be entitled to an additional Delegate when its population reached 75,000. It is possible that this figure would be reached by 1970, and it is certainly probable that it would be reached by 1980.

Under the 1950 Census, Charles County had a population of 23,415, and its estimated population for 1960 is 32,000. The County now has two Delegates, and would be entitled to a third when its population reaches 50,000 under the proposed plan. The County is near Washington, and we are advised that its population has been growing quite rapidly [fol. 40] in the last few years, and it is certainly possible that it would obtain an additional Delegate in either 1970 or 1980.

Harford County's population under the 1950 Census was 51,782, and its estimated population for 1960 is 71,000. Harford County now has four Delegates, and it would become entitled under the proposed plan to an additional Delegate when its population reached 100,000, and it is possible that this figure would be reached by 1970, and it will certainly be reached by 1980.

Howard County, under the 1950 Census, had a population of 23,119 and its estimated population for 1960 is 32,000. This County now has two Delegates, and would become entitled under the plan to an additional Delegate when its population reaches 50,000, and as the County adjoins Baltimore City, it may reach 50,000 by 1970, and would certainly reach that figure by 1980.

St. Mary's County, under the 1950 Census, had a population of 29,111, and its estimated 1960 population is 40,500. The County now has only two Delegates. It would become entitled to a third Delegate, under the plan, when its population reaches 50,000, and it seems rather certain that the County will reach that figure by 1970, as it will only need a gain of 9,500.

If the figures heretofore given are substantially correct, it seems probable that the maximum House membership of 141 would not be reached until 1980, and on this basis, the proposed plan would take care of matters until the 1990 Census, which is a period of thirty years from the present.

It would, of course, be desirable to devise a plan which would solve the problem for all time to come, but the failure of our forefathers to accomplish this in the Constitution of 1867, and the difficulties which have arisen from their efforts to do so, the great changes in population in various

parts of the State which have occurred in recent years, and the inability of human beings to foresee the future, render this impossible.

Our present problem stems largely from the population yardsticks set out in the Constitution of 1867, plus the failure to hold a Constitutional convention every twenty years as provided for by that Constitution. Any group which attempts to deal with the problem is at once faced [fol. 41] with the established representation now given Baltimore City and each County, and with the practical difficulty of getting a sufficient number of the members of the Legislature to vote for a proposal which in any way lessens the political importance of their respective political units. The result is that a compromise must be sought which will make at least some improvement in the present situation without decreasing to an unreasonable extent the political stature and importance of any area of the State.

We express the hope that the proposed plan accomplishes these ends and that it will meet with the approval of the fairminded ladies and gentlemen who compose the Maryland Legislature.

The Report of the Commission is unanimous, except that Senator Harry R. Hughes and Delegate John Hanson Mitchell would prefer that a County now having two Delegates shall be entitled to three Delegates when its population reaches 40,000, rather than the 50,000 figure agreed to by the majority of the Commission.

Senator William S. James would prefer a permanent reapportionment plan with maximum and minimum representation and with the balance of representation to flow with the population.

Respectfully submitted,

ALGER Y. BARBEE,
WILSON K. BARNES,
JOSEPH BERNSTEIN,
RICHARD F. CLEVELAND,
J. EDGAR HARVEY,
HARRY R. HUGHES,
WILLIAM S. JAMES,

J. ALVIN JONES,
JAMES J. LINDSAY,
JOHN HANSON MITCHELL,
JAMES C. MORTON,
DR. MILDRED OTENASEK,
RALPH W. POWERS,
WOODROW F. STRONG,
WILLIAM C. WALSH, *Chairman.*

DECEMBER 31, 1959.

[fol. 42] NOTE:

The original report of the Commission was submitted under date of October 10, 1959. The Legislative Council rejected this report by vote of 12 to 5, with all Baltimore representatives who were present voting against the report. The present final report provides for a possible increase in Baltimore City's representation in the General Assembly, but is otherwise approximately the same as the original report.

[fol. 43]

See Opposite ☞

Federal Census Figures for Maryland

	1870	1880	1890	1900	1910	1920	1930	1940	1950 (Estimated)	1959 (Estimated)	1960
Allegany	38,536	38,011	41,571	53,694	62,411	69,938	79,098	86,973	89,556	82,000	82,500
Anne Arundel	24,457	28,526	34,094	40,018	39,533	43,408	55,167	68,375	117,392	194,000	205,000
Baltimore	63,142	87,334	72,969	90,755	122,399	74,817	124,565	155,825	270,273	447,000	465,000
Calvert	9,865	10,538	9,860	10,223	10,325	9,741	9,528	10,484	12,100	14,700	15,000
Caroline	12,101	13,767	13,903	16,248	19,216	18,652	17,387	17,549	18,234	19,400	19,400
Carroll	28,619	30,992	32,376	33,860	33,934	34,245	35,978	39,054	44,907	54,500	55,500
Cecil	25,874	27,108	25,851	24,662	23,759	23,612	25,827	26,407	33,356	48,500	49,500
Charles	15,738	18,548	15,191	18,316	16,386	17,705	16,166	17,612	23,415	31,200	32,000
Dorchester	19,458	23,110	24,843	27,962	28,669	27,895	26,813	28,006	27,815	28,200	28,800
Frederick	47,572	50,482	49,512	51,920	52,673	52,541	54,440	57,312	62,287	70,000	71,200
Garrett (founded 1872)	—	12,175	14,213	17,701	20,105	19,678	19,908	21,981	21,259	20,000	20,000
Harford	22,605	28,042	28,993	28,269	27,905	29,291	31,603	35,060	51,782	70,800	71,000
Howard	14,150	16,141	16,269	16,715	16,106	15,826	16,169	17,175	23,119	30,500	32,000
Kent	17,102	17,605	17,471	18,786	16,957	15,026	14,242	13,465	13,677	15,800	16,000
Montgomery	20,563	24,759	27,185	30,451	32,089	34,921	49,206	83,912	164,401	312,000	325,000
Prince George's	21,138	26,265	26,080	29,898	36,147	43,347	60,095	89,490	194,182	350,000	370,000
Queen Anne's	16,171	19,259	18,461	18,364	16,839	16,001	14,571	14,476	14,579	15,400	15,600
St. Mary's	14,944	16,934	15,819	18,136	17,030	16,112	15,189	14,626	29,114	39,700	40,500
Somerset	18,190	21,668	24,155	25,923	26,455	24,602	23,382	20,965	20,745	21,300	21,390
Talbot	16,137	19,065	19,736	20,342	19,620	18,306	18,583	18,784	19,428	20,200	20,300
Washington	34,712	38,560	39,782	45,133	48,671	59,694	65,882	68,838	78,886	90,000	91,000
Wicomico (founded 1867)	15,802	18,011	19,930	22,852	26,815	28,114	31,229	34,530	39,641	50,200	51,000
Worcester	16,419	19,539	19,747	20,865	21,841	22,309	21,624	21,245	23,148	25,000	25,500
Total Counties	513,295	602,439	607,951	681,093	735,885	715,781	826,652	962,144	1,393,293	2,050,400	2,123,300
Baltimore City	267,354	332,313	434,439	508,957	558,485	733,826	804,874	859,100	949,708	989,000	991,500
State of Maryland	780,649	934,752	1,042,390	1,190,050	1,294,372	1,449,607	1,631,526	1,821,241	2,343,001	3,039,400	3,114,800

[fol. 44]

Exhibit G to Complaint

List of Unsuccessful Attempts to Enact Legislation Calling for a Constitutional Convention

1951 through 1959*

The references in this exhibit are to the pages of the appropriate journals for the years noted. All the bills listed were introduced for the purpose of convening a Constitutional Convention.

1951

1. S.B. 296 was introduced, but tabled (p. 500) on a roll call vote.
2. H.B. 30 was reported from Committee, recommitted (p. 186), and was defeated when an unfavorable report was adopted (p. 233).
3. H.B. 242 was introduced (p. 312), but died in Committee.
4. H.B. 243 was introduced (p. 313), but died in Committee.
5. H.B. 284 was introduced (p. 358), but died in Committee.

1954

6. H.B. 31 was introduced, petitioned from the Rules Committee, and then referred to the Judiciary Committee, which gave it an unfavorable report. The unfavorable report was adopted by the House (p. 424).

1955

7. H.B. 66 was introduced (p. 114), but died in Committee.

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* This information is taken from the journals of the General Assembly for the years concerned, as compiled by the Office of Research of the Legislative Council of the State of Maryland.

1957

8. H.B. 138 was introduced (p. 136), but died in Committee.

[fol. 45] 1958

9. H.B. 47 was introduced, and after being re-referred to the House Judiciary Committee, died there (p. 105).

10. H.B. 58 was introduced and was reported unfavorably to the House of Delegates, which accepted the unfavorable report (p. 364).

[fol. 46]

EXHIBIT H TO COMPLAINT

EXECUTIVE DEPARTMENT

Annapolis, Maryland
July 11, 1960

J. Millard Tawes,
Governor

Mr. Royce Hanson, Executive Vice President,

Committee for Fair Representation,
4907 Redford Road,
Bethesda, Maryland.

DEAR MR. HANSON:

Governor Tawes has reviewed your letter of July 6th, and has asked me to reply to the same.

In the 4th paragraph of your letter you request the Governor to state that he will not sign any commissions to be issued to the members of the General Assembly elected in the 1962 election unless these members have been elected on an "at-large" basis, or unless, prior to that time, the General Assembly should pass legislation designed to amend the Constitution in regard to the re-apportionment of seats in the General Assembly.

Governor Tawes agrees with you and members of your committee that the re-apportionment of seats in the Gen-

eral Assembly, especially in the House of Delegates, is out of balance with the population in our sub-divisions, and, consequently, there is need for a change in the law.

However, I am afraid that what you have requested the Governor to do cannot, at this time, be done legally by him. Section 5, Article 3 of the State Constitution fixes the number of representatives permitted to each County in the House of Delegates. Naturally, the Governor has no authority to change this, nor does he have the authority to refuse to sign a commission on behalf of any individual who has been properly elected to the General Assembly. Neither the Governor, the County Boards of Supervisors of Elections, or the State Board of Canvassers, can do any [fol. 47] more than enforce the law, as it now exists. They cannot adopt the attitude that they will refuse to enforce the law, unless the law has been changed to meet their views.

Thanking you for your interest in this matter, and with kindest personal regards, I am

Sincerely yours,

/s/ Lloyd L. Simpkins,
Executive Assistant to Governor Tawes.

LLS/rnb

In the Circuit Court of Anne Arundel County

Demurrer of Tawes, Etc.

To the Honorable, The Judge of Said Court:

The Respondents, J. Millard Tawes, Governor, Board of State Canvassers, Thomas B. Finan, Secretary of State, member of said Board, Louis L. Goldstein, Ferdinand Sybert, Hooper S. Miles, and James Lloyd Young, also members of said Board, by James O'C. Gentry, Assistant Attorney General, demur to the Bill of Complaint and each and every paragraph thereof heretofore filed herein, and for grounds of said Demurrer, say:

1. Said Bill of Complaint is bad in substance and insufficient in law.

2. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to the relief prayed.

3. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to any relief in a Court of Equity.

4. Said Bill of Complaint fails to state any cause of action.

5. The Petitioner, "The Maryland Committee for Fair Representation", is not a proper party to these proceedings, in that it has no voting rights nor rights to legislative representation.

6. Said Bill of Complaint, paragraph 11, shows on its face that there is no constitutional or statutory provision [fol. 48] for the relief prayed, and that this Court is asked to usurp purely legislative prerogatives.

7. Said Bill of Complaint, Prayers for Relief No. 3, requests a finding that Article III of the Maryland Constitution violates the United States Civil Rights statutes, whereas it is known that Federal statutes do not supersede or overcome provisions of a State Constitution; therefore, the relief prayed cannot be granted.

8. The relief prayed in said Bill of Complaint cannot be granted without total destruction to the constitutional concept of "separation of powers", since Petitioners ask this Court to direct the Legislature to convene a Constitutional Convention, when the General Assembly has admittedly considered such action but has chosen not to so act.

9. The relief prayed in said Bill of Complaint requests this Court to enjoin the conduct of any State election until the General Assembly takes the action which is advocated by the Petitioners, whereas this Court has no such power to so enjoin an election.

10. And for such other reasons as may be assigned at the hearing.

And as in duty bound, etc.

James O'C. Gentry, Asst. Attorney General, 1201 Mathieson Building, Baltimore 2, Md., Lexington 9-5413, Solicitor for J. Millard Tawes, Governor, Board of State Canvassers and the Members thereof.

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

DEMURRER OF HANTSKE, ET AL.

To the Honorable, the Judges of Said Court:

The Respondents, Douglas W. Hantske, Edgar A. Bowen and Carroll A. Cole, constituting the Board of Election Supervisors of Anne Arundel County, by Morris Turk, its [fol. 49] Solicitor, demur to the Bill of Complaint filed herein for the following reasons:

1. The Bill of Complaint filed herein is bad in substance and insufficient in law.

2. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to the relief prayed.

3. The matters and things set forth in said Bill of Complaint are insufficient to entitle the Petitioners to any relief in a Court of Equity.

4. That said Bill of Complaint fails to state any cause of action.

5. That the Bill of Complaint, on its face, shows that there is no constitutional or statutory provision for the relief prayed, and that the relief prayed is asking the Court to perform the function of the Legislature.

6. That Prayer No. 3 in the Bill of Complaint requests a relief of a Statute to supersede a provision of State Constitution, which, on its face, cannot be granted.

7. That the Bill of Complaint is asking this Court to enjoin the conduct of elections until the General Assembly

takes the action advocated by the Petitioner, which injunction cannot be granted by this Court.

8. That the prayer which is sought by the Petitioners in this Bill of Complaint for relief is a legislative matter and not a judicial matter.

9. And for such other reasons as may be assigned at the hearing hereof.

And as in duty bound, etc.

Morris Turk, Maryland Inn, Annapolis, Maryland.

[fol. 62]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

ORDER FOR APPEAL—Filed March 22, 1961

Pursuant to Rule 811a of the Rules of Procedure, all petitioners of record herein respectfully request the Court (through the Clerk thereof) to enter this Order for Appeal on the docket of this Court. Said Order for Appeal is taken from the order of Judge O. Bowie Duckett, entered on the docket of this Court on February 21, 1961, which decree sustained respondents' demurrers to petitioners' bill of complaint, and also dismissed said bill of complaint without leave to amend, wherein petitioners had sought both declaratory and injunctive relief, as specified in subparagraphs (1) through (11) of the prayers for relief contained in said bill of complaint.

Petitioners respectfully request that the Clerk, pursuant to Rule 811c, prepare and transmit the record in this case to the Court of Appeals, to be transmitted there on or before April 19, 1961, pursuant to Rule 825 of the Rules of Procedure.

[fol. 63]

IN THE COURT OF APPEALS OF MARYLAND

No. 52

September Term, 1961

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR,
and
BOARD OF STATE CANVASSERS, et al.

OPINION, PRESCOTT, J.—April 25, 1962

[fol. 64] In its entire history, this Court has seldom, if ever, been called upon to decide a case of greater, or more far-reaching, importance than the case at bar. It involves the composition and proper organization of the State Government itself, and the correlative duties and responsibilities of the coordinate branches thereof. The problem calls for the best efforts of all three branches of the State Government in order to furnish to the people of Maryland, without the uncertainties of an interregnum and its attendant risk of chaos, an orderly and continuous system of self-government that will not violate any of the provisions of the Maryland or Federal Constitutions. It needs no citation of authority to state that if any portion of the system of Maryland's government infringes upon the Federal Constitution, which is the supreme law of our land, it must yield to the provisions of the Federal Constitution. And if it does infringe upon the Federal Constitution, it is also invalid under our own constitution, which provides:

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, * * * are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or Law of this State to the contrary notwithstanding." Maryland Declaration of Rights, Article 2.

[fol. 65] We deem it appropriate, at the outset, to say that the questions involved in this case do not bring on a clash between any two branches of our State Government. We, as members of the Judiciary, are not required to declare any previous action of the Governor or of the Legislature invalid or unlawful. The foundation question posed is whether Section 2 or Section 5 of Article III of the Maryland Constitution, or both (the sections that apportion the members of the General Assembly), in view of the present distribution of population in Maryland, constitute an unreasonable, discriminatory dilution of appellants'[1] rights of suffrage (insofar as the 1962 election is concerned), in violation of the Equal Protection clause of the Fourteenth Amendment of the Federal Constitution, which is, of course, the Supreme Law of the entire United States, and specifically made the Supreme Law of this State by Maryland's Constitution, as pointed out above.

The decision of the Supreme Court of the United States in the recent case of *Baker* v. *Carr*, —— U.S. ——, presents problems that must be considered by all three branches of our State Government. There can be no doubt that the decisions of the Supreme Court construing the Federal [fol. 66] Constitution and Acts of Congress pursuant thereto are conclusive and binding, not only upon the state courts,[2] but also upon all other branches and departments of the Federal and State Governments. In the *Baker* case, as in the case at bar, citizens, who were eligible voters, sought declaratory and injunctive relief. They challenged the validity of the Tennessee apportionment statute upon the ground that they were being denied "equal protection of the laws" under the Fourteenth Amendment by virtue of a dilution or debasement of their votes. The District Court dismissed the action on the grounds that the Court lacked jurisdiction and the complaint failed to state a claim upon which relief could be granted (there was also an additional

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[1] This, of course, refers to the individual appellants. We shall use the word "appellants" hereafter quite often as referring only to those who are persons.

[2] This was recognized in this State as early as the decision of the case of Howell v. State, 3 Gill 14.

ground not here pertinent). The Supreme Court reversed, holding that the subject matter was within the federal judicial powers as defined in Article III, § 2 of the Federal Constitution, and Congress had assigned original jurisdiction thereof to the District Courts by Section 1343 (3) of 28 U.S.C. It further held that a justiciable cause of action had been stated upon which the appellants would be entitled to appropriate relief, and the appellants had standing to challenge the apportionment statute. The Court also noted that it had "no cause at this stage to doubt the District Court will be able to fashion relief if violations [fol. 67] of constitutional rights are found." Indeed, Mr. Justice Clark, who preferred that the case be decided upon its merits, suggested, in a concurring opinion, that the District Court do the apportioning. —— U.S. at page ——.

It is our belief that if any action needs to be taken in order to bring the State's system of legislative apportionment into conformity with the requirements of the Fourteenth Amendment and Article 2 of the Maryland Declaration of Rights, it is preferable from the point of view of responsible self-government that the State's own duly constituted officials and the people themselves undertake the task, rather than leave to the Federal judiciary the delicate and perhaps unwelcome task of doing so. We take it under *Baker* v. *Carr, supra*, that it is clearly a task which the Federal courts would be duty bound to undertake, upon a proper showing of the need therefor.[3] Assuming that the allegations of appellants' bill of complaint are true, this can only be accomplished by action upon the part of the Governor of this State, the Legislature and this Court. We proceed to consider whether this can be lawfully done under our present constitution and laws.

The case reaches this Court upon appeal from a decree of the Circuit Court for Anne Arundel County, as a Court of Equity, which sustained demurrers to appellants' bill of complaint requesting declaratory and injunctive relief,[4] and dismissed the same.

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[3] More will be said of the Baker case later.

[4] We have pointed out in at least three recent cases that demurrers should rarely be sustained in suits for declaratory relief.

(footnote continued)

[fol. 68] The bill alleges that the plaintiffs (appellants), with one exception, are residents, taxpayers and eligible voters of the counties of Anne Arundel, Baltimore, Prince George's and Montgomery (hereinafter sometimes referred to as the "four suburban counties"), and the City of Baltimore. The other appellant, the Maryland Committee for Fair Representation, is an unincorporated private association composed of taxpayers and eligible voters residing in the aforementioned counties and elsewhere in Maryland.[5] The defendants (appellees) are: the Governor of this State, whose duty it is to issue commissions to candidates elected to office in state elections, in conformity with the statements and determinations made by the Board of State Canvassers and delivered to him by the Secretary of State (Code [1957], Article 33,[6] section 143 [b]); the Board of State Canvassers (State Canvassers), whose duty it is to determine and declare, upon the basis of the certified copies of election returns made to them by the city and county canvassers, what persons have been elected to office at any [fol. 69] state election, including election to the General Assembly (Section 142 [b]); the Secretary of State, who is required to record the certified statement and determinations of election delivered to him by the State Canvassers and to transmit a copy of the determinations to the Gover-

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Shapiro v. County Comm., 219 Md. 298, 302, 149 A. 2d 396; John B. Robeson v. Gardens, 226 Md. 215, 219, 172 A. 2d 529; Reed v. Pres. of North East, 226 Md. 229, 253, 172 A. 2d 536. The rule concerning the same is stated in Shapiro, supra. The instant case illustrates, as will be seen later, some of the reasons therefor. Although there seems to be little dispute as to the facts, the most that we can do, under the present posture of the appeal, is to assume the truth of well-pleaded facts for the purposes of the demurrers alone. Had the actual facts been established, by stipulation or otherwise, much time and expense possibly would have been saved.

[5] One of the demurrers challenged the standing of this party, but the chancellor did not decide the question, nor was any argument made thereon in appellees' brief. We shall, therefore, assume, without deciding, that the Committee is a proper party.

[6] All future references will be made to the Code (1957), Article 33, unless otherwise noted.

nor (Section 143 [a]); and the Board of Election Supervisors of Anne Arundel County.

The bill further alleges (with the allegations supported by Exhibits) that the 1960 population figures, based on the Federal census taken in 1960, show the present total population of Maryland is 3,072,999. The total combined population of the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's and the City of Baltimore is 2,312,485, which is approximately 76% (percentages hereinafter mentioned are usually approximate ones) of the total 1960 population of the State. The population of the remaining 19 counties is 760,514, or 24% of the total population. Yet, under the representation now provided by Sections 2 and 5 of Article III of the Maryland Constitution, the four suburban counties and the six legislative districts of Baltimore City each have one member in the State Senate for a total of 10 out of 29 who comprise that body, or 34% of the total representation in the State Senate; and the said suburban counties and legislative districts of Baltimore have a total of 60 delegates out of a total of 123, who comprise the House of Delegates, or 49% of the total representation in that House.

[fol. 70] Further allegations of the bill assert that the four suburban counties and Baltimore City are the only political subdivisions of the State subjected to under-representation in the General Assembly, and these allegations are supported by plaintiffs' Exhibit D. This Exhibit shows that when the entire population of the State elects 29 senators, each, population-wise, represents some 106,310 persons of that population. None of the counties of Maryland has a population of over 106,310, except the four suburban counties. And, if the composition of the State Senate were based upon the present population alone, the four suburban counties and Baltimore City would be entitled to 22 instead of 10 Senators. The Exhibit shows that in Baltimore County the mean figure of 106,310 persons represents but 22 percent of its population, and varies upward in the other counties to a peak in Kent County, where the same mean figure represents 692 percent of its total population.

The Exhibit discloses a like situation with reference to representation in the House of Delegates, (based upon

25,065 of population for each Delegate): all of the suburban counties and Baltimore City are subjected to under-representation, varying from minus 3% in Baltimore City to minus 225% in Baltimore County, and all of the other counties enjoy over-representation ranging from 23% over-representation in Harford County to 74% in Somerset [fol. 71] County. For examples, it shows that each of the four Delegates from Dorchester County represents a figure of 7,399 of population, while each of the six Delegates from Baltimore County represents 81,700 of population; and each of the three Delegates from Talbot County represents 7,173 of population, while each of the six from Prince George's County represents 59,343.

The bill also contains allegations that the four suburban counties and Baltimore City contributed for the fiscal year ending in 1959, 84% of the income tax revenue, 73% of the sales and use tax revenue, 83% of the corporation franchise tax and 70% of the revenue obtained from business licenses; and, although the four suburban counties contain 46% of the total motor vehicle registrations in the State, they received back only 12% of the total allocation to the various political subdivisions of the motor vehicle fuel tax.

The bill further asserts that no legislative relief is available to the appellants, and it points out and specifically names at least eleven bills that were introduced in the General Assembly, during the last ten years, for achieving some reapportionment of or change in the representation now provided in the aforementioned Sections 2 and/or 5 of Article III, and that legislation proposing the call of a constitutional convention was introduced at the 1954, 1955, 1957 and 1960 sessions of the General Assembly. The [fol. 72] bill then states that all of these reapportionment proposals and the legislation introduced for the purpose of convening a constitutional convention failed of passage because of the opposition of the members of the General Assembly representing the less populous counties.

The bill also states that under the provisions of Section 2 of Article XIV and Section 9 of Article XVII of the Maryland Constitution a referendum with respect to the question of whether a constitutional convention should be convened was held in the 1950 general election, and the

proposal to assemble a convention was approved by a vote of some 200,000 to 70,000, but bills to make the proposal operative introduced at the next session of the General Assembly were tabled.

The complaint further asserts that the appellants are suffering irreparable injury as a consequence of the "illegal discrimination in the exercise and effect of their voting rights and the taxation without adequate representation to which they and all eligible voters" of the four suburban counties and Baltimore City are subjected by virtue of the above mentioned Sections 2 and 5, which sections violate their rights of suffrage guaranteed under the Equal Protection clause.

The prayers, condensed, are:

(1) That the court grant a declaratory judgment holding that Sections 2 and/or 5 of Article III of the Maryland Constitution violate the Fourteenth Amendment of the United States Constitution;

[fol. 73] (2) That the court declare that the representation in the General Assembly as now established by said sections 2 and 5 violates the Civil Rights statutes, *i.e.*, Title 28 U.S.C. 1343 (3) and (4), and Title 42 U.S.C. 1983;

(3) That the court declare that the General Assembly's failure to reapportion its membership in accordance with a formula which reasonably reflects the present population of the different counties and Baltimore City violates the Equal Protection clause and the said Civil Rights statutes, as well as Article 7 of the Maryland Declaration of Rights;

(4) That the court declare the General Assembly's failure to convene a constitutional convention, "as approved in the General Election of 1950," violates Section 2 of Article XIV of the Maryland Constitution as it read in 1950, as well as Articles 1, 7 and 45 of the Declaration of Rights;

(5) That the Court permanently enjoin the Board of State Canvassers and the members thereof, as identified herein, from determining, certifying, or in any other way indicating the Board's approval of the election of any candidate

to the General Assembly of Maryland in any State election to be held in November 1962 or thereafter (unless such future State election be held on an at large basis), until such time as the General Assembly of Maryland shall have enacted and submitted for a referendum vote by the eligible voters of this State, an amendment or amendments [fol. 74] to Sections 2 and 5, Article III of the Maryland Constitution, which would reapportion, on the basis of present population and in conformity with Section 1 of the Fourteenth Amendment of the United States Constitution, the representation which is allotted to the various counties and the City of Baltimore in the General Assembly of Maryland;

(6) That the Court enjoin defendant Tawes from issuing commissions of elections to any candidates for the General Assembly of Maryland in any State election to be held in November 1962, or thereafter (unless such future election be held on an at large basis), until such time as the General Assembly of Maryland shall have taken the action requested in paragraph (5) of these prayers for relief;

(7) That the Court enjoin the Board of Election Supervisors of Anne Arundel County from issuing commissions to any candidates to the General Assembly of Maryland from Anne Arundel County in any state election to be held in November, 1962, or thereafter, unless held on an at large basis, or the General Assembly shall have taken the action requested in prayer (5) above;

(8) That the Court retain jurisdiction of the case, require the defendants to pay the costs, and grant such other and further relief as may seem just and proper.

We shall first determine what we consider the subsidiary questions raised by the appellants. In regard to prayer (2), Section 1983 of Title 42 U.S.C. provides, in part, that "every person" who subjects, under color of law, custom, etc., any other person to the deprivation of his constitutional rights, privileges, etc., shall be liable to the party injured. Section 1343 (3) and (4) of Title 28 U.S.C. gives [fol. 75] original jurisdiction to the Federal District Courts

to redress such deprivations, including equitable relief under any Act of Congress providing for the protection of civil rights. Clearly, Section 1343 (3) and (4) has no application at all, since there is no question pertaining to the jurisdiction of a Federal District Court. Section 1983 of Title 42, U.S.C., though it creates a new liability and affords means for its enforcement and for the enforcement of constitutional and other rights for the protection of which the new cause of action and remedies are given, does not create the constitutional or other rights for the violation of which it affords a cause of action and remedies. On the allegations of the bill, we are unable to see any "violation" of Section 1983. We conclude that there is no basis for a declaration that either of the Sections just referred to is violated by the present Maryland legislative apportionment, even if that apportionment should be found to be invalid under the Fourteenth Amendment.

In view of what we hold below in regard to the other prayers, we deem it unnecessary to consider specifically prayers (3) and (7). The underlying purpose of these prayers and of the whole bill appears to be to obtain relief for the future. Insofar as prayer (3) may seek a declaration as to the past, our comments below on prayer (4) are applicable to it also.

Prayer (4) asks for a mere declaration that the General Assembly's failure to convene a constitutional convention, as the result of an election that occurred more than ten years ago, violates certain of the provisions of our con- [fol. 76] stitution. It is no more, we think, than a request to answer an abstract question, which, if answered, would serve no useful purpose. Such action is not included among the purposes of declaratory relief, under our statutes. 1 Anderson, *Declaratory Judgments*, §§ 3, 222. The declarations requested in prayers (2) and (4) seem to have been framed with the Federal Declaratory Judgments statute, Title 28 U.S.C.A. § 2201, in mind which, as we read it, seems broader in scope than the Maryland statutes relating to declaratory judgments.

This brings us to the pivotal questions to be determined. It will be noted the Court is requested to declare that Sections 2 and/or 5 of Article III (hereafter referred to as

Sections 2 and 5) are unconstitutional, and to enjoin certain of the State's officials from certifying the election of candidates, *at the election to be held in November 1962*, in the absence of some relief from the infringement upon the appellants' asserted constitutional rights. As we view the appellants' contentions here, their entire thrust is directed to the election of 1962, and the future, and we shall so consider it.

If Sections 2 and/or 5 are unconstitutional, whose function, duty and obligation is it to declare them to be so? Section 1 of Article IV of the Maryland Constitution vests the judicial power of the State in the Judiciary, and this encompasses *all* the judicial power the State. *Magruder* v. *Swann*, 25 Md. 173. That the Judiciary is the ultimate au- [fol. 77] thority to determine whether constitutional limitations have been transcended is a proposition that has been so long established and frequently applied it can no longer be seriously challenged. Chancellor Kent states that in *Marbury* v. *Madison*, 1 Cranch 137, "The power and duty of the judiciary to disregard an unconstitutional act of Congress, or of any state legislature, were declared [by Chief Justice Marshall], in an argument approaching to the precision and certainty of a mathematical demonstration." 1 Kent's Commentaries (14th ed.) p. 609. For two of the cases in which this Court decided whether provisions of the Maryland Constitution violated the Federal Constitution, see *Anderson* v. *Baker*, 23 Md. 531, and *Toscano* v. *Watkins*, 223 Md. 49, 162 A. 2d 438, reversed 367 U.S. 488.

But it is suggested that although it is the general rule that courts determine questions of constitutional transgressions, this is not so when "political questions," *i.e.*, questions which, under the constitution, are to be decided by the people in their sovereign capacity, or in regard to which full discretionary authority has been delegated to the legislative or executive branch of the government, are involved; and that the question now being considered is a political one. We are referred to such cases as *Kidd* v. *McCanless*, 292 S.W. 2d 40 (Tenn. 1956), and the cases therein cited. It is unquestionably true that the courts will not determine [fol. 78] purely political questions, but this *consessum* does

not determine whether the question now being considered is a political one. The question would give us considerable concern, and we would discuss it more thoroughly, were it not for the Supreme Court's decision in *Baker* v. *Carr*, *supra*. In that case, where the facts and issues involved were quite similar to those in the case at bar, the Court considered, exhaustively, what are, and what are not, "political questions." It specifically considered *Kidd* v. *McCanless*, affirmed 352 U.S. 920, which was the forerunner of and involved the same statute in, the *Baker* case. No useful purpose would therefore be served if we discuss *Kidd* elaborately. The Court, in *Baker*, flatly, held that the determination of whether or not a question is political is one for the Court, as the ultimate interpreter of the Constitution. And it stated: "We understand the District Court to have read the cited cases [those cited by the District Court in 179 F. Supp., at 826, which included *Kidd* v. *McCanless*, 352 U.S. 920] as compelling the conclusion that since the appellants sought to have a legislative apportionment held unconstitutional, their suit presented a 'political question' and was therefore nonjusticiable. We hold that this challenge to an apportionment presents no nonjusticiable 'political question'. *The cited cases* [which as we noted above included *Kidd* v. *McCanless*, *supra* 352 U.S. 920] *do not hold to the contrary*." (Emphasis ours.)

We may add that the Supreme Court of Tennessee in *Kidd* v. *McCanless*, *supra*, did not in terms invoke the political question doctrine, but based its refusal of relief on the [fol. 79] ground that the declaration sought by the plaintiffs would, under the Tennessee doctrine of *de facto* officers, leave the State without a legislature.

Unfortunately, the term "political question" is more a label indicating a result than a guide as to whether or not a particular question is purely political and so non-justiciable. In *Baker* v. *Carr*, *supra*, the Supreme Court's stated holding (as we noted above) were (a) that the court [the District Court] possessed jurisdiction of the subject matter; (b) that a justiciable cause of action was stated upon which appellants would be entitled to appropriate relief; and (c) that the appellants had standing to challenge the Tennessee apportionment statutes. To arrive at holdings

(a) and (b) it was necessary for the Supreme Court to determine only questions of Federal jurisdiction and of justiciability under Federal law. Much of its discussion of prior cases in which the Court had taken the view that the questions therein presented were political, is directed to a showing that many of these cases involved questions the determination of which was committed to one of the other coordinate branches of the Federal Government. A number of these involved the provision of the Federal Constitution guaranteeing a republican form of government to each of the States. Some few cases involving political questions were described as cases in which problems of relief were controlling, such as *Radford* v. *Gary*, 352 U.S. 991 (a per curiam affirmance of the dismissal of a suit by a District Court based upon *Colegrove* v. *Green*, 328 U.S. 549, and *Kidd* v. *McCanless*, above cited).

[fol. 80] There was no need in *Baker* v. *Carr*, *supra*, for the Supreme Court to pass upon the power of a State court to deal with questions of State legislative apportionment. Since we are bound by our State Constitution as well as by the Constitution of the United States to give effect to the supremacy of the latter, and since we recognize the decisions of the Supreme Court of the United States as binding interpretations of the Constitution of the United States, it seems to follow that the holding of the Supreme Court in *Baker* v. *Carr*, *supra*, that a question such as the one here presented does present a justiciable question under the Federal Constitution, is controlling here. Though under the separation of powers rationale for many of the political question cases cited in the *Baker* case, the courts of this State might be powerless if no Federal constitutional right were involved, the very foundation of the appellants' case is the alleged violation of their rights under the Equal Protection clause of the Fourteenth Amendment to the Federal Constitution (and under Article 2 of our Declaration of Rights).

That such a case as this is appropriate for consideration by a State court is, we think, implicit in the vacation of the judgment and remand by the Supreme Court of the United States to the Supreme Court of Michigan of the case of *Scholle* v. *Hare* on April 23, 1962 (—— U.S. ——). This

is an apportionment case involving the provision of the Michigan Constitution, as amended in 1952, which froze representation in the State Senate on a geographical basis [fol. 81] therein fixed by the amendment. The Michigan Court relied heavily upon *Colegrove* v. *Green*, *supra*, in reaching its conclusion (360 Mich. 1, 104 N.W. 2d 63). The jurisdiction and the obligation of State courts to enforce and protect rights created by the Federal Constitution or by Federal statutes is well established, in the absence of any limitation upon State action by Federal statute or by the nature of the right, provided the subject matter is within the general jurisdiction of the State court in which the right is sought to be enforced. *Claflin* v. *Houseman*, 93 U.S. 130; *Robb* v. *Connolly*, 111 U.S. 624, 637; *Mondou* v. *New York, N. H. & H. R. Co.*, 223 U.S. 1; *Mooney* v. *Holohan*, 294 U.S. 103; *United States* v. *Bank of New York & Trust Co.*, 296 U.S. 463, 479; *Testa* v. *Katt*, 330 U.S. 386, 392; *Irvin* v. *Dowd*, 359 U.S. 394. The question here would seem to come down to whether there is anything in the Constitution or laws of Maryland to prevent this Court from acting in this case.

In a number of cases in other States there have been provisions in the constitutions of those States calling for reapportionment by legislative action. Authority to initiate legislation to conform to such a constitutional requirement is not vested in the courts of those States, yet in a number of instances, courts have acted in such cases and have not considered themselves barred from doing so by the political question doctrine. Here, it is alleged that ap- [fol. 82] portionment provisions of our State Constitution impinge upon rights under the Federal Constitution, which are expressly made superior to any conflicting provisions of the State Constitution. If these allegations are well founded, the invalidity of our apportionment provisions is no less than if we had a constitutional requirement for periodic reapportionment by the Legislature on a basis of population and the Legislature had failed to carry out the mandate. The duty of our courts to determine the validity of provisions of the State Constitution in the light of the Federal Constitution is, as we have already noted, well established. As Mr. Justice Brennan pointed out in

the *Baker* case, citing *Nixon* v. *Herndon*, 273 U.S. 536, "the mere fact that the suit seeks protection of a political right does not mean it presents a political question." —— U.S. ——.

The Supreme Court of our nearby, sister State of New Jersey had a very similar situation to the one at bar presented to it in 1960. Citizens, who were taxpayers, brought an action seeking a declaration that the 1941 New Jersey apportionment law then in effect had been rendered unconstitutional by the 1950 census. The Court held that the Judiciary of that State had the solemn duty to interpret laws in the last resort, and, however delicate that duty may be, the courts can not surrender, ignore, or waive it, adding that the authority and duty to act when the Court's jurisdiction is invoked in such cases, in the words of Chief Justice Beasley in *State* v. *Rogers*, 28 A. 726, 757 (N.J.), is " 'so entirely established as not to be debatable.' " There as in the instant case, the argument was made that if the apportionment act were declared unconstitutional, it would [fol. 83] create chaos and break down the framework of the State Government. The Court answered that argument in this manner:

> "There is no doubt, as we have stated, that it is within the competence of the Judiciary to adjudge a reapportionment act violative of the Constitution. Some of the defendants suggest that to do so would be to create chaos or anarchy, because no matter how long the filing of our mandate was withheld to permit the enactment of a curative law, the state government would be completely disrupted if the Legislature did not act within that time. Although we agree that if the 1941 act has become unconstitutional, resort could not be had to an apportionment act of an earlier vintage because any such measure would also be invalid by the same test, we do not believe that the allegedly feared result would ever come about. A judiciary, conscious of the sacrosanct quality of its oath of office to uphold the Constitution, cannot accept an *in terrorem* argument based upon the notion that members of a coequal part of the government will not be just as respectful and regardful of the obligations imposed by their

similar oath. Any less faith on our part would be an unbecoming and unwarranted reflection on the Legislature.

"Concrete examples of justification for such faith are available. The two State v. Cunningham cases, supra, [State ex rel. Lamb v. Cunningham, 83 Wisc. 90, 53 N.W. 35; State v. Cunningham, 81 Wisc. 440, 51 N.W. 724.] reveal that on March 22, 1892, the Supreme Court of Wisconsin declared the existing apportionment act invalid. On July 2, 1892 a special legislative session passed a new act. It, too, was invalidated by the same court on October 7, 1892, but ten days later, at a second special session, another reapportionment was adopted, and that act validated the notices of election previously issued by the Secretary of State for the November 8, 1892, election."

The Court decided it would make no declaration at that time, but it would retain jurisdiction in order to afford the New Jersey Legislature time to consider the adoption of a constitutional reapportionment statute. *Asbury Park Press, Inc.* v. *Woolley*, 161 A. 2d 705, 712, 716. The New Jersey [fol. 84] Legislature met, and, in accordance with its duty, enacted a reapportionment bill.

Also, in *Magraw* v. *Donovan*, 163 F. Supp. 184, a three-judge District Court considered, in 1958, the constitutionality of Minnesota's apportionment statute. The Court assumed jurisdiction, stated that, "it is not to be presumed that the Legislature will refuse * * * to comply with its duty under the State Constitution," and that " * * * if there [were] to be a judicial disruption of the [then] present legislative apportionment * * *, it should not take place unless and until it [could] be shown that the Legislature * * * [at its next meeting] advisedly and deliberately failed and refused to perform its constitutional duty to redistrict the State." The Court then deferred decision in order to afford the Legislature full opportunity to "'heed the constitutional mandate to redistrict,'" but retained jurisdiction with leave to any of the parties, within 60 days after the adjournment of the next session of Minnesota's Legislature, to petition the Court for such action

as they deem appropriate. Thereafter, the Minnesota Legislature, in accordance with its duty, enacted a reapportionment bill, and the action was dismissed.

In *Jones* v. *Freeman*, 146 P. 2d 564, 570, the Supreme Court of Oklahoma stated: "It might be well to point out that in 1938, the courts of twenty-two states had exercised the power, or had stated that they had the power, to review legislative apportionment acts upon constitutional grounds * * * ." See also the Annotation in 2 A.L.R. 1337, and Lewis, *Legislative Apportionment*, 71 Harv. L. Rev. 1057; 1066-1070.

[fol. 85] Section 2 provides, *inter alia*, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election.

Section 5 states that the membership of the House of Delegates shall consist of 123 members, and apportions them among the counties and the legislative districts of Baltimore City.

There is no provision of the Maryland Constitution that expressly provides for reapportioning of the representation in the General Assembly.[sa] Article XIV, Section 1 provides for amendments to the Constitution generally. It states, in substance, that the General Assembly may propose amendments, and if passed by three-fifths of all the members elected to each of the Houses, they shall be submitted to the qualified voters of the State for adoption or rejection; and, if it shall appear to the Governor that a majority of the votes cast at said election were cast in favor of the amendments, the Governor shall proclaim said amendments to have been adopted by the people. Section 2 of said Article XIV provides, again in substance, that the General Assembly shall provide by law for taking, at the general election in 1970, and every twenty years thereafter, the sense of the people in regard to the calling of a constitutional convention and if a convention be assembled each county

[sa] Section 4 of Article III provides for altering the boundaries of the legislative districts in Baltimore City to provide approximately equal population in said districts.

[fol. 86] and legislative district shall be entitled to a number of Delegates thereto equal to its total representation in both Houses at the time of the convention. Thus, it is seen that if the allegations of the bill of complaint are true, and we must assume them to be true for the purposes of the demurrer, the chances of the appellants' obtaining relief from the infringement upon their alleged constitutional rights, other than from the courts, is so remote as to be practically nil.

From what we have said above, we hold that the question now under consideration is not a non-justiciable one, but one that it is our duty to determine.

We now arrive at a point where it is proper for us to decide whether the well-pleaded allegations of the bill of complaint, which, as stated above, are admitted for the purposes of the demurrer, are sufficient to show that appellants' constitutional rights of suffrage are being impaired by what they term "the deliberate, discriminatory and gross dilution of [their] rights of suffrage which has prevailed in Maryland since 1867, and grows worse with each passing year." We could write page after page on the cherished rights of citizens to enjoy free and reasonably equal suffrage, disfranchisement through gross malapportionment and its adverse consequences,[7] and the vigorous [fol. 87] criticisms of malapportionment by legal commentators,[8] representatives of the press,[9] and public officials, but, if we did so, it would only be a repetition of what has been said time and time again, and practically all, if not all, of which was considered by the Supreme Court, the ultimate

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[7] See for example: Commission on Intergovernmental Relations, A Report to the President, 38-40 (1955); Douglas, Unequal Voting: A Challenge to Democracy, 1 Labor's Economic Review 88, 89; Baker, Rural v. Urban Political Power, 27, 28; Walter, Reapportionment and Urban Representation, 195 Annals 11, 12.

[8] Lewis, Legislative Apportionment and the Federal Courts, 71 Harv. L. Rev. 1057; Tabor, The Gerrymandering of State and Federal Legislative Districts, 16 Md. L. Rev. 277; 17 Law & Contemp. Prob. 253-469.

[9] Strout, The Next Election is Already Rigged, Harper's Magazine, November, 1959; The Wall Street Journal, October 17, 1960, p. 1.

interpreter of the Federal Constitution, in the case of *Baker* v. *Carr*, *supra*. We think the answer to our present question, in the main part, is contained in the decision in that case.

We do not think it possible (or advisable if it were possible) to state a precise, inflexible and intractable formula for constitutional representation in the General Assembly. The determination in each case must depend upon the facts existent at the time it is decided. In Maryland, there is no requirement, constitutional or otherwise, that such representation be based upon a mathematical ratio of population, or of eligible voters, and we do not intimate such a ratio is necessary to meet constitutional requirements. However, even though the Tennessee Constitution specifically provided that representation in the General Assembly should be apportioned among the counties or districts "according to the number of qualified voters in each," there is a strong implication in the *Baker* decision that there must be some [fol. 88] reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination. The State is, of course, to be allowed every reasonable latitude in such relationship, and any discrimination therein "will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1961). Cf. *Williamson* v. *Lee Optical of Oklahoma*, 348 U.S. 483, 489. The representation in the State Senate of Maryland has traditionally been based more upon area and geographical location (one from each county and each legislative district of Baltimore City) than upon the relationship of population, or eligible voters; hence, a greater latitude may be permissible in the relationship of population, or eligible voters, in the State Senate than in the House of Delegates, or possibly some different basis of apportionment of seats might be permissible.[10] Such a question may be presented in the *Scholle* case.

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[10] The apparent analogy between the political subdivisions of the State and the States of the Union, insofar as legislative representation is concerned is not close, though it is not to be over-

[fol. 89] History,[11] also, has been recognized as a pertinent consideration in the making of a constitutional determination (*Frank* v. *Maryland*, 359 U.S. 360); and geography has also been recognized as worthy of some consider-

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looked entirely. It is, perhaps, more relevant since the adoption of the Seventeenth Amendment, which provides for the popular election of Senators, than it was before; but the difference between a mere political subdivision of a State and a State retaining attributes of sovereignty remains very substantial.

[11] Historically, a distinction has been made between the two Houses in this State ever since the Constitution of 1776. Under it, each county was entitled to four delegates, and the City of Annapolis (a part of Anne Arundel County) was entitled to elect two and Baltimore Town (then a part of Baltimore County) was also entitled to elect two (unless its population should decline). The Senate was selected by electors chosen two per county and one each from Annapolis and Baltimore who then elected six senators from the Eastern Shore and nine from the Western Shore. Under the Constitution of 1851, each county and the City of Baltimore was entitled to elect one senator, but representation in the House of Delegates was to be generally in proportion to population after the census of 1860, with an initial apportionment varying from two to six members for the several counties. No county was to have less than two delegates and Baltimore City was always to have four more delegates than the most populous county. Reapportionment was to be made after each national decennial census, and the number of members of the House was to be not less than 65 nor more than 80. Under the Constitution of 1864, each county and each of the three legislative districts in the City of Baltimore was to elect one senator. Representation in the House of Delegates was to be apportioned on the basis of the white population. Each county was to be entitled to one delegate for each 5000 persons or fractional portion over one-half thereof up to five delegates, to one additional delegate for the next 20,000 persons or fractional portion over one-half thereof, and above that number to one delegate for every 80,000 persons, or fractional portion thereof above one-half. Reapportionments were to be made after each national census. An initial apportionment was made of from 2 to 6 members per county or legislative district. The Constitution of 1867 continued the provision for one senator from each county and from each of the three legislative districts into which the City of Baltimore was divided. The House was to consist initially of from two to six members from the several counties and of six from each legislative district of Baltimore. This was to continue until the next national or state census, after which representation was to be as follows:

ation through the protection which it may afford to some segments of the population in matters of electoral concern. *MacDougall* v. *Green*, 335 U.S. 281. What effect such con-[fol. 90]-siderations may have in the light of the remand of the *Schglle* case and of whatever may be its ultimate disposition, is something which we cannot now determine; nor would the present posture of the case make it appropriate for us to express any definitive opinion with regard to these matters.

The well-pleaded allegations of the bill of complaint, as we have noted above, state that 24% of Maryland's population elect 66% of the State Senators and 51% of the members of her House of Delegates, and, in the present posture of the case, inquiry into the rational basis for such apportionment seems to be called for. We, therefore, hold that the demurrers should have been overruled, and the chancellor should now receive evidence to determine whether or not an invidious discrimination does exist with respect to representation in either or both houses.

[fol. 91] We turn now to the proper relief to be granted, if Sections 2 and/or 5 are determined to be unconstitutional. It is suggested that they should not be declared unconstitutional as to the November election of 1962, because this action would be adjudicating future rights. The courts, or-

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2 delegates for any county of less than 18,000 population; 3 for each county between 18,000 and 28,000; 4 for each county from 28,000 to 40,000; 5 for each county from 40,000 to 55,000; and 6 but no more, for each county with more than 55,000 population. Each Baltimore legislative district was to have as many delegates as the most populous county. Reapportionment was to be made by proclamation of the Governor after each national or any state census. This system continued in force with changes in 1900 to four legislative districts in Baltimore, and in 1922 to six, until 1950, when to check the increasing power of small counties whose representation might still increase long after more populous units had attained their maximums of six each, the membership of the House was frozen at its then total and at the fixed apportionment of members among the State's political subdivisions as it then was—that is, on the basis of the 1940 census. These provisions were continued without substantial change in the 1956 revision of the Constitution, which did not undertake to make substantial changes. (No attempt has been made to include all of the Amendments to the Constitution relating to past apportionments of membership.)

dinarily, will not decide future rights in a declaratory action, but "where the declaration of future rights is bound up with a present necessity of a declaration of the same, and these present rights depend upon such a declaration, then the reason for refusal to grant declaratory relief disappears." 1 Anderson, *op cit.*, § 231. In the same section, the learned author states the same principles thus:

> "After all, however, it should not be overlooked that the true purpose or mission of the Declaratory Judgment Act is to guide parties in their future conduct to avoid useless litigation. If an actual controversy exists and that controversy is of a justiciable character necessary to meet the demands of the act, the remedy may, and should be invoked, and where it appears clearly that the effect of the determination of the issues raised by a decision in a declaratory action will be to avoid much useless expense and burdensome litigation, and it is clear, likewise, that an actual controversy exists, then the remedy is proper, even though it is granted for future use."

See also *Heald* v. *Heald*, 56 Md. 300; *Devecmon* v. *Shaw*, 70 Md. 219, 16 A. 645; *Fleishman* v. *Bregel*, 174 Md. 87, 92, 197 A. 593; Borchard, *Declaratory Judgments* (1st ed.), §§ 339, 340, 542, 543; and compare *Pennington* v. *Pennington*, 70 Md. 418, 17 A. 329. The facts of the instant case bring it within the principles laid down in the above authorities, and the desirability of making a declaration now [fol. 92] relative to Sections 2 and 5 as to the November 1962 election is, we think, obvious.

If the chancellor should find and accordingly declare that Sections 2 and/or 5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867, and amendments thereto,[12] re-

[12] A reading of the provisions of the original constitution of 1867 relating to the apportionment of membership in the General Assembly, and all amendments thereto, culminating in the present Sections 2 and 5, show that they are in little, if any, better positions to meet the required tests than the sections as they are now constituted. Consequently, if we assume without deciding,

lating to the apportionment of membership (and only to such apportionment) in the General Assembly, insofar as they apply to the General Election of November, 1962, violate the Equal Protection clause of the Fourteenth Amendment of the Constitution of the United States (and are, therefore, also inconsistent with Article 2 of the Declaration of Rights), it would declare that Sections 2 and/or 5 are null, void and of no effect in regard to said election.[13] The court's declaration should make it clear that the tenure and terms of the present members of the General Assembly [fol. 93] are, in no way, affected by such declaration. They have been elected and have qualified as members of the General Assembly, and they are entitled to serve their full terms. Article III, Section 19, and Article XVII, Sections 1 and 3, Constitution of Maryland.

The possibility that an adjudication of the invalidity of Section 2 or Section 5, or both, of Article III might create a total or partial legislative hiatus after the election of 1962, leads us to express some views with regard to procedures which might render action of an equity court going beyond mere declaratory relief unnecessary or inappropriate.

There is no provision in the Constitution or election laws of this State that permits an "at large" election of the members of the General Assembly, as suggested by the appellants. Article III, Section 6, of the Constitution provides that Delegates to the House shall be elected by the qualified voters of the counties, or legislative districts, which said Delegates represent.

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that if, and when, the present Sections 2 and/or 5 are declared unconstitutional, the former sections would, ordinarily, become operative, they will not do so, because they, too, would be unconstitutional. Cf. Scholle v. Hare, 104 N.W. 2d 63, 125 (concurring opinion).

[13] It should be noted that the court is not requested to declare these Sections invalid as of any particular time, but only prospectively as they affect the November, 1962, election. The theory being that, due to the increase and redistribution of population in the State, somewhere along the line they became unconstitutional, and certainly so in reference to the above mentioned election.

If the Court should declare that Sections 2 and/or 5 are invalid as to the November, 1962, election, it should also declare that the Legislature has the power, if called into Special Session by the Governor and such action be deemed appropriate by it, to enact a bill reapportioning its membership for purposes of the November, 1962, election. With Sections 2 and/or 5 no longer a part of the Constitution with reference to said election, this necessarily follows, [fol. 94] because the powers of the General Assembly of Maryland are plenary, except as limited by constitutional provisions. *McMullen* v. *Shepherd*, 133 Md. 157, 104 A. 424; *Brawner* v. *Supervisors*, 141 Md. 586, 119 A. 250; *Hennegan* v. *Geartner*, 186 Md. 551, 47 A. 2d 393. For other Maryland cases to the same effect; see 5 M.L.E., *Constitutional Law*, § 81. Such a bill might include any provisions relating to the primary elections or to nominations for the general election which might be necessary to effectuate the provisions of the bill. See *Hennegan*, just cited.

A reapportionment Act might take the form of an actual increase or decrease in the number of seats in either or both houses of the General Assembly apportioned to the several political subdivisions of the State, or might adjust the number of votes or the fractional votes to be cast by the members so as to achieve the same relative voting strength as if an actual reapportionment of membership (with each member having one vote) were made. If a reapportionment bill be passed as an Emergency Act, the latter course (leaving the membership in both Houses, numerically, as it now is), probably, would avoid a conflict with Article XVI, Section 2, which prohibits an Emergency Measure from creating or abolishing any office.

In the circumstances above assumed, namely, that Sections 2 and/or 5, are declared invalid, the decree might also declare that the General Assembly would be empowered to propose a constitutional amendment providing for reapportionment. This presumably would accomplish the [fol. 95] same result proportionately between the different subdivisions of the State as that provided for in any reapportionment Act adopted for the 1962 election, and it might include provisions for future reapportionment designed to avoid a recurrence of the present problem. Since

it has been traditional in this State to have the matter of representation in the General Assembly expressly regulated by the State Constitution, it might be thought desirable to draft any Act dealing with the 1962 election as a stop-gap measure, and to provide in any Constitutional Amendment that might be proposed a provision confirming and continuing in force the provisions of such an Act after the adoption of the proposed Constitutional Amendment and until the election to be held in 1966.

Of course, the courts cannot direct the Governor to call the General Assembly into extraordinary session; that is a power the exercise of which lies entirely within his discretion. Nor can they compel the General Assembly to enact a reapportionment bill. These are powers that the courts neither possess, nor profess. But, the courts do have the power and authority to restrain the potency of actions of the coordinate branches of the government (except in regard to purely "political questions") when they transcend constitutional limits. *Watkins* v. *Watkins*, 2 Md. 341; *Plan-*
[fol. 96] *ning Commission* v. *Randall*, 209 Md. 18, 26, 120 A. 2d 195. And the courts may require, by mandamus, the performance by executive officers of ministerial duties, and also enjoin them in the performance of such duties. *Magruder* v. *Swann*, 25 Md. 173; *Brooke* v. *Widdicombe*, 39 Md. 386; *Soper* v. *Jones*, 171 Md. 643, 187 A. 833. The issuance of commissions by the Governor to those elected to office has been held by this Court to be ministerial in nature. *Magruder* v. *Swann*; *Brooke* v. *Widdicombe*, both *supra*.

If the Governor sees fit to call a Special Session of the General Assembly and the General Assembly deems it proper to enact a bill that apportions its membership so as to meet constitutional requirements, the chancellor would be unwarranted in granting injunctive relief. He should, therefore, not enjoin anyone at this time, but he should retain jurisdiction, so that proper injunctive relief can be granted before the November, 1962, election, should the situation at that time call for the same.

With this disposition of the case, it becomes unnecessary to discuss appellants' arguments concerning alleged violations of the Due Process clause.

The appellees, who were defendants below, have taken no action that would make it proper to award costs against them in this suit.

[fol. 97] Because of the urgency of the case, we think that our mandate should issue forthwith, and it will be so ordered.

Decree Dismissing Appellants' Bill of Complaint Reversed, and Cause Remanded for Further Proceedings in Conformity With This Opinion; Appellants to Pay the Costs; the Mandate of This Court to Issue Forthwith.

[fol. 99] DISSENTING OPINION

Henderson, J. dissenting:

In *Baker* v. *Carr*, —— U.S. ——, the factual situation was different from that in the instant case. The Tennessee constitution fixed the maximum number of State Senators and Representatives, and called for a census of qualified voters every ten years and a reapportionment among the several counties and districts in accordance with such enumerations. In adopting the latest reapportionment Act in 1901, the Tennessee General Assembly chose to rely upon the Federal Census, and departed widely from the constitutional standard of apportionment. Since that date all legislative proposals for reapportionment failed of passage. Meanwhile there was a substantial growth and redistribution of population, causing a considerable disparity in the ratio of representation to population as between the various counties and districts, and a consequent dilution of the voting strength of the complainants.

In Maryland, the Constitution itself fixes the exact number of State Senators and Delegates and the counties and districts from which they are each elected. There is no provision in the Maryland Constitution or law that calls for reapportionment. Representation in the Senate has always been based on geographical considerations, and never on population. In 1776 the Senate was composed of fifteen Senators, nine from the Western Shore and six from the [fol. 100] Eastern Shore. In 1851, each county and the City of Baltimore became entitled to one Senator. The

Convention probably followed the pattern of the United States Senate, composed of two senators from each state. In 1864, Baltimore City was divided into three districts, and by constitutional amendment in 1922, it became entitled to six. That is the present arrangement; one Senator from each county and one each from the six districts of Baltimore City. See Md. Const., Art. III, sec. 2.

In the House of Delegates, population did not become a factor until 1851. In 1864 and again in 1867, a sliding scale was adopted fixing the representation by numbers ranging from two to six. See Md. Const., Art. III, sec. 5. In 1922, Baltimore City became entitled to 36 Delegates, six from each district. Due to recent shifts in population Baltimore City's representation is now almost at par. The four metropolitan counties have suffered. In 1950, a constitutional amendment, last ratified in 1956, froze the representation on a basis calculated to some extent upon the figures of the Federal Census of 1940. This prevented the small counties from gaining increased representation as their population grew, at the expense of the larger counties and the legislative districts of Baltimore City, whose representation had long since reached the maximum and been frozen at six delegates. The complaint in the instant case is not that the Legislature has failed to obey any constitutional or statutory mandate, but that since 1956 it has re- [fol. 101] peatedly failed to enact proposals for constitutional amendments to set up a legislative body giving more weight to population than to geography as prescribed in the present Constitution. The crucial question in this case is whether Maryland courts can or should attempt to redress the alleged wrong.

Baker v. *Carr, supra,* was a civil action brought in the Federal District Court under 42 U.S.C. §§ 1983 and 1988, to redress an alleged deprivation of Federal rights. It sought a declaration that the 1901 Act of Tennessee was unconstitutional, and an injunction restraining the State Board of Election Supervisors from certifying any further elections under it.[1] It further prayed that unless and until the General Assembly should enact a valid reapportion-

[1] One point left open in *Baker* was whether the local Boards of Election were indispensable parties.

ment, the District Court should either decree a reapportionment by mathematical application of the Tennessee constitutional formulae, or direct the appellees to conduct legislative elections, primary and general, at large. In reversing the three-judge Federal court and remanding the case to the District Court, a plurality of the Supreme Court held that the right asserted was within the reach of judicial protection in the Federal courts under the [fol. 102] Fourteenth Amendment.[2] But there was no suggestion as to how the District Court should proceed. It would appear that the selection of a remedy was left to the ingenuity of the District Court, if and when it should find that the allegations of the bill were supported by proof of an invidious, and an otherwise irremediable, discrimination.

If we assume that no valid justification for the present allocation of representation in Maryland can be made, and that no remedial constitutional amendment can pass the Legislature,[3] and relief by the calling of a Constitutional Convention is likewise unavailing,[4] the instant case would seem to fall within the ambit of *Baker* v. *Carr, supra*. But there are points of distinction. If the Tennessee Act of 1901 were stricken down, and the Legislature were recalcitrant, it is conceivable that the District Court might there order an election to be held and the votes tallied in accordance with the mathematical formulae set out in the Tennessee Constitution. At least, the Court would not have to invent formulae for the purpose. On the other [fol. 103] hand, if the provisions of the Maryland Con-

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[2] It is a somewhat ironic thought that if the Supreme Court had not declined to examine the evidence, on the ground that it was a political question, it would probably have been compelled to hold that the Fourteenth Amendment itself was never validly adopted. See *Coleman* v. *Miller*, 307 U.S. 433, 450.

[3] A bill designed to that end failed of passage by only two votes in the recent Legislative session.

[4] The Attorney General argues that the failure to call a Constitutional Convention after the election of 1950 was not due to the recalcitrance of the Legislature or any other State official, but because there was not the requisite number of votes to meet the requirements of the Maryland Constitution, Art. XIV, sec. 2.

stitution were stricken down there would remain no guide, standard or constitutional means whereby a legislative body could be constituted. Even if the Legislature should then meet and adopt a Constitutional amendment, grave doubts would arise as to their authority to act, even if all of their prior acts were not put in question. The gravity of this situation has impressed other courts, see *Kidd* v. *McCanless*, 292 S.W.2d 40 (Tenn.) (appeal dismissed 352 U.S. 920), *State* v. *Zimmerman*, 23 N.W.2d 610 (Wis.) and *Butcher* v. *Rice*, 153 A.2d 869 (Pa.), and led them to decline to intervene. There would also be a serious time lag before the people could vote upon the proposal and new elections could be held under an amendment so adopted.[5]

I believe it is a basic tenet of the common law, to which the inhabitants of Maryland are entitled under Art. 5 of the Declaration of Rights, that judges do not make law but discover it. Thus, if a novel point is decided, or an erroneous decision is overruled in those rare instances that are permissible under the rule of *stare decisis* to which this Court adheres, the decision relates back to the beginning. Likewise, a decision construing a constitutional provision or statute relates back to the date of its adop- [fol. 104] tion or enactment. It is for this reason that courts seek to find the popular or legislative intention contemporaneous to the adoption or enactment. It would seem to follow that a present declaration and construction of the Fourteenth Amendment would necessarily relate back to the time of its adoption, and not merely speak from the date of the declaration. In any event, it would seem that once a declaration is made, no court can suspend the operation and effect of the decision to a later date. Quite apart from the doctrine of relation back, an adjudication that the present Legislature is unconstitutionally constituted would destroy its power to enact even a proposed amendment to the Maryland Constitution.

In *Griffin* v. *Illinois*, 351 U.S. 12, Mr. Justice Frankfurter, in a concurring opinion, suggested that the decision in that case might be applied prospectively, like a legislative

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[5] It should be noted that the members of the Legislature are elected for four years in Maryland, Art. III, sec. 6.

enactment, but apparently the suggestion was not approved by any other member of the Supreme Court. In the New Jersey case, cited by the majority in the instant case, apparently the Supreme Court of that State made no declaration but merely retained jurisdiction with the clear intimation that, unless the Legislature should act before a dead line, which it fixed, a declaration would be made. I know of no Maryland precedent for such action.

The statement in the majority opinion in the instant case, that if the provisions of the Maryland Constitution, Art. III, secs. 2 and 5, were stricken down, in whole or in part, the Legislature would possess the power to remedy the situation, I think is gratuitous and unsupportable. [fol. 105] The point is not properly before us under Maryland Rule 885, since it was not raised below, and was never mentioned in the arguments in this Court. See also *Comptroller* v. *Aerial Products*, 210 Md. 627, and *Rose* v. *Paape*, 221 Md. 369. In any event, the matter of how the Legislature shall be selected has always been regulated in Maryland by the Constitution itself. To my mind, no doctrine of plenary or inherent powers can take away a right to deal with a subject matter expressly reserved to the people of this State, and vest it in a legislative body. Cf. *Bennett* v. *Jackson*, 116 N.E. 921 (Ind.).

The opinion of a majority of the Court in the instant case goes even further. It directs the chancellor, upon proof of the allegations of the bill, to make a declaration striking down the provisions of one or more sections of the Constitution, but at the same time to defer the effectiveness of the declaration until after the expiration of the terms of office of the present members. I cannot understand how that can be done. But if it can, I cannot see how those members could enact legislation reapportioning and reconstituting the General Assembly in the teeth of constitutional provisions that are still in force and effect. Yet this is required, in addition to the passage of a constitutional amendment, as a condition precedent to the validity of the 1962 elections. The opinion further directs that a clause ratifying the proposed legislative reappor- [fol. 106] tionment be included in the proposed constitutional amendment. It seems to me that this is an advisory

opinion to a coordinate branch of the Government which is not a party to the suit, and a declaration *in terrorem*.

I find nothing in the Maryland law to support the proposition that reapportionment is a subject fit for judicial determination or action. In Art. III, sec. 19, of the Maryland Constitution it is provided that "each House shall be the judge of the qualifications and elections of its members, as prescribed by the Constitution and Laws of the State * * *." This is in line with Art. 8 of the Declaration of Rights concerning the separation of powers. This Court cannot require the legislature to take action within the scope of its prerogative, by mandamus or otherwise. *Planning Commission* v. *Randall*, 209 Md. 18, 24; *Connor* v. *Board of Supervisors*, 212 Md. 379, 385; *Watkins* v. *Watkins*, 2 Md. 341. Cf. *Fergus* v. *Marks*, 152 N.E. 557 (Ill.). Of course, courts cannot compel the people to adopt a new Constitution. Under Art. I of the Declaration of Rights the people have "at all times the inalienable right to alter, reform or abolish the form of Government in such manner as they may deem expedient." On the other hand the Legislature itself cannot impose non-judicial duties upon the courts of this State. *Cromwell* v. *Jackson*, 188 Md. 8, 28, and cases cited. The rule of judicial abstention is wider than the doctrine of separation of powers. [fol. 107] The English and colonial precedents cited by Mr. Justice Frankfurter in his dissenting opinion in *Baker* v. *Carr* denied judicial relief, even before the doctrine of separation of powers was enunciated. The rule of judicial abstention is sometimes based on a lack of jurisdiction, sometimes on judicial policy.

A declaratory judgment itself is not mandatory, but is limited to occasions where a declaration will serve a useful purpose or terminate controversy. *Givner* v. *Cohen*, 208 Md. 23, 37. Constitutional questions are not to be dealt with abstractly. *Liberto* v. *State's Attorney*, 223 Md. 356, 360. We have repeatedly held that this Court cannot render advisory opinions. *Hammond* v. *Lancaster*, 194 Md. 462, 471. Whether this Court is prevented from deciding moot cases by a lack of jurisdiction or a rule of decision is

beside the point.[6] There is little dispute as to the end result.

The prayer in the bill wherein it is implied that, as an alternative, elections at large should be decreed by the court and enforced through the agency of the Board of State Canvassers, set up by Code (1957), Art. 33, sec. 142, seems to me to be untenable. It has been held that the Board acts in a ministerial capacity only. *Bowling* v. *Weakly*, 181 Md. 496. Clearly, the Board has no statutory authority to reapportion. Moreover, Art. III, sec. 9 of the [fol. 108] Maryland Constitution specifically requires that Senator and Delegate reside in the county or legislative district which he may be chosen to represent. It has been held that courts may order an election at large for members of the Federal House of Representatives. See *Brown* v. *Saunders*, 166 S.E. 105 (Va.) and *Smiley* v. *Holm*, 285 U.S. 355. But those cases turn on the fact that the Federal Constitution, Art. I, sec. 4, expressly confers upon Congress a power to legislate on the subject and that Congress has enacted legislation providing in effect, that if the States fail to reapportion so as to equalize votes in Congressional elections according to the constitutional standard, elections shall be at large.[7] There is no equivalent provision as to the members of State legislatures. Cf. *Shriver* v. *Gray*, 276 F.2d 568 (C.A. 5th). Congress has no constitutional power to legislate on the subject, except interstitially, as in the Federal statutes upon which *Baker* v. *Carr*, *supra*, was based.

The appellants argue that even if we lack the power to enforce a declaration, it would serve a useful purpose. I venture to disagree. I think it is not within the realm of judicial propriety to issue a declaration *in terrorem*. In the words of Mr. Justice Clark this would amount to "black-[fol. 109] jacking the Assembly." Mr. Justice Frankfurter, in his dissenting opinion (p. 62 Footnote 151) said: "Appellants' suggestion that, although no relief may need be given, jurisdiction ought to be retained as a 'spur' to legislative action does not merit discussion." The suggestion

[6] See *Lloyd* v. *Supervisors of Elections*, 206 Md. 36, 43.

[7] See 2 U.S.C. § 4.

was not discussed by any other of the members of the Court, in *Baker* v. *Carr*, *supra*. I assume, therefore, that the decision was predicated upon a finding that the Federal District Court possessed the authority to make a declaration effective, although the means was left to future determination.

The argument that convinces a majority of this Court seems to be that because we are obliged to follow the interpretation of the Federal Constitution by the Supreme Court as the Supreme law of the land, we must take some action. It is true that this Court is as firmly bound by the decisions of the Supreme Court as are the Federal courts. But I venture to doubt that the Supreme Court can confer jurisdiction upon the State courts, even to enforce the Federal Constitution, if they possess no such power under the Constitution and laws of this State. Cf. *Niemotko* v. *State*, 194 Md. 247. In any event, I think the Supreme Court, in *Baker*, did not purport to deal with the authority of State courts at all. Nor do I think the remand of the case of *Scholle* v. *Hare*, —— U.S. —— (just decided) forecloses the matter. The remand was for the purpose of allowing the Michigan court to give further consideration [fol. 110] to the question presented in the light of *Baker* v. *Carr*. As I understand it, this was not an adjudication that the State court was not free to adopt its own view of the availability of a State remedy.

In *Baker*, the Supreme Court held that in an extreme case of disproportion in voting strength the Federal courts can and should "fashion" a judicial remedy. It did not hold that there must be a State remedy. On the contrary, in the opinion of the court, delivered by Mr. Justice Brennan, he said (p. 48): "* * * in *Kidd* v. *McCanless*, 200 Tenn. 273, 292 S.W.2d 40, the Supreme Court of Tennessee held that it could not invalidate the very statute at issue in the case at bar, but its holding rested on its state law of remedies, i.e., the state law of *de facto* officers, and not on any view that the norm for legislative apportionment in Tennessee is not numbers of qualified voters resident in the several counties. Of course this Court was there precluded by the adequate state ground, and in dismissing the appeal, 352 U.S. 920, we cited *Anderson*, *supra*,

[343 U.S. 912] as well as *Colegrove* [328 U.S. 549]. Nor does the Tennessee court's decision in that case bear upon this, for just as in *Smith* v. *Holm*, 220 Minn. 486, 19 N.W.2d 914, and *Magraw* v. *Donovan*, 163 F.Supp. 184, 177 F.Supp. 803, a state court's inability to grant relief does not bar a federal court's assuming jurisdiction to inquire into alleged deprivation of Federal constitutional rights. Problems of relief also controlled in *Radford* v. *Gary*, 352 [fol. 111] U.S. 991, affirming the District Court's refusal to mandamus the Governor to call a session of the legislature, to mandamus the legislature then to apportion, [fol. 112] and if they did not comply, to mandamus the State Supreme Court to do so. And *Matthews* v. *Handley*, 361 U.S. 127, affirmed a refusal to strike down the State's gross income tax statute—urged on the ground that the legislature was malapportioned—that had rested on the adequacy of available State legal remedies for suits involving that tax, including challenges to its constitutionality. Lastly, *Colegrove* v. *Barrett*, 330 U.S. 804, in which Mr. Justice Rutledge concurred in this Court's refusal to note the appeal from a dismissal for want of equity, is sufficiently explained by his statement in *Cook* v. *Fortson*, *supra*: 'The discretionary exercise or nonexercise of equitable or declaratory judgment jurisdiction * * * in one case is not precedent in another case where the facts differ.' 329 U.S., at 678, no. 8." Mr. Justice Clark in his concurring opinion also cited the *Kidd* and *Anderson* cases as resting upon adequate state grounds to support the State judgments. It would seem that no member of the Supreme Court, with the possible exception of Mr. Justice Douglas, thought that the *Kidd* case was overruled, or that the ruling in *Baker* precluded the State courts from adopting their own views as to the availability of State remedies.

Since I find nothing in the prior decisions of this Court that would support the exercise of an equitable remedy under the allegations of the bill, I think the chancellor's dismissal of the bill should be affirmed. Judge Horney authorizes me to say that he concurs in the views here expressed.

[fol. 113]

IN COURT OF APPEALS OF MARYLAND

No. 52, September Term, 1961

MARYLAND COMMITTEE FOR FAIR REPRESENTATION ET AL.

v.

J. MILLARD TAWES, GOVERNOR AND BOARD OF STATE CANVASSERS ET AL.

Appeal from the Circuit Court for Anne Arundel County.

Filed: April 21, 1961.

April 25, 1962: Decree dismissing appellants' bill of complaint reversed, and cause remanded for further proceedings in conformity with this opinion; appellants to pay the costs; the mandate of this Court to issue forthwith. Op. Prescott, J.

Henderson, J. files dissenting opinion in which Horney, J. concurs.

MANDATE

STATEMENT OF COSTS:

In Circuit Court:

Record	$ 15.00
Stenographer's Costs	—

In Court of Appeals:

Filing Record on Appeal	20.00
Printing Brief for Appellant	662.39
Reply Brief	
Appellants' Appendix	537.17
2 Appearance Fees—Appellants	20.00
Printing Brief for Appellee	203.15
Portion of Record Extract—Appellee	
2 Appearance Fees—Appellees	20.00

[fol. 113a]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

Equity No. 13920

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., Petitioners

v.

J. MILLARD TAWES, GOVERNOR, ET AL., Respondents

ORDER DIRECTING RESPONDENTS TO PLEAD AND SETTING CASE FOR HEARING—May 4, 1962

The final order entered in the above entitled case having been appealed to the Court of Appeals of Maryland and the Court of Appeals of Maryland, on April 24, 1962, having filed an opinion reversing the aforementioned order and issuing its mandate to this Court "because of the urgency of the case", and it appearing to the Court that it is necessary to receive evidence to determine the issues presented, it is therefore hereby Ordered that the Respondents answer the allegations of the Bill of Complaint or otherwise plead within 10 days from the date of this order, and

Be It Further Ordered, that this case be set for hearing before the Court on May 21st, 1962, with briefs to be exchanged between the parties and filed with the Court at or before the date set for hearing.

Dated this fourth day of May, 1962.

O. Bowie Duckett, Judge.

[fol. 114]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

[Title omitted]

ANSWER—Filed May 14, 1962

To the Honorable, the Judge of Said Court:

The Respondents, J. Millard Tawes, Governor, Board of State Canvassers, Lloyd L. Simpkins, now Secretary of State, member of said Board, Louis L. Goldstein, Comptroller, member of said Board, Thomas B. Finan, now Attorney General, member of said Board, Hooper S. Miles, Treasurer, member of said Board, and James Lloyd Young, Clerk of the Court of Appeals of Maryland, member of said Board, each acting in his official capacity, by Thomas B. Finan, Attorney General, Joseph S. Kaufman, Deputy Attorney General, and James P. Garland, Assistant Attorney General, their attorneys, do pursuant to Rule 372 of the Maryland Rules of Procedure and in obedience to the Order of this Honorable Court dated May 4, 1962, answer the Bill of Complaint as follows:

1. That in answering paragraphs 1, 2, 3 and 4 of the Bill of Complaint, the Respondents admit the allegations and conclusions thereof.

2. That in answering paragraph 5 of the Bill of Complaint, the Respondents admit the allegations thereof.

3. That in answering paragraph 6 of the Bill of Complaint, the Respondents admit that the Respondent J. [fol. 115] Millard Tawes is Governor of the State of Maryland, and further admit that the Board of State Canvassers is an official agency of the State of Maryland and that the members of the Board are the Secretary of State, the Comptroller of the Treasury, the Attorney General, the State Treasurer, and the Clerk of the Court of Appeals. The Respondents further admit that at the time of the filing of the Bill of Complaint, Thomas B. Finan was Secretary of State of Maryland, but since that time the office of Secretary of State has been and is presently occupied by

Lloyd L. Simpkins; the Respondents further admit that Louis L. Goldstein is the Comptroller of the Treasury of the State of Maryland; that at the time of the filing of the Bill of Complaint, C. Ferdinand Sybert was Attorney General, but since that time he has resigned that office and at the present, Thomas B. Finan is Attorney General of Maryland; and that Respondents admit that Hooper S. Miles is the Treasurer of the State of Maryland and that James Lloyd Young is the Clerk of the Court of Appeals.

Further answering said paragraph, these Respondents admit that the Board of Election Supervisors of Anne Arundel County is an agency of the State of Maryland and that the named Respondents are members of that Board.

4. That in answering paragraph 7 of the Bill of Complaint, the Respondents admit the allegations thereof.

5. That in answering paragraph 8 of the Bill of Complaint, the Respondents admit that the Petitioners are private persons, citizens, taxpayers and eligible voters of the State of Maryland. Further answering said paragraph, the Respondents can neither admit nor deny the allegations and conclusions otherwise contained in said paragraph.

6. That in answering paragraphs 9, 10, 11 and 12 of the Bill of Complaint, the Respondents admit that the provisions recited are properly recited from the Constitution of Maryland.

7. That in answering paragraph 13 of the Bill of Complaint, the Respondents say that Exhibit A is an approximate reproduction of the census figures compiled by the Department of Commerce, Bureau of Census, for the year [fol. 116] 1960; however, that the official census return is contained in Exhibit 1, attached hereto (Maryland Manual, 1961-62, p. 629).

8. That in answering paragraph 14 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph; and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combina-

tion of political subdivisions and this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

9. That in answering paragraph 15 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph; and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combination of political subdivisions and that this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

10. That in answering paragraph 16 of the Bill of Complaint, the Respondents admit the mathematical figures contained in the allegations of said paragraph and in further answering said paragraph, the Respondents state that the combination of certain counties and Baltimore City for the purposes of comparison create an artificial combination of political subdivisions and that this combination is irrelevant and immaterial to the rights of the Petitioners and the rights which they seek to protect.

11. That in answering paragraphs 17, 18 and 19, these Respondents admit the mathematical figures contained in said paragraphs, but believe that the allegations are completely irrelevant and immaterial to the rights sought to be protected by the Petitioners.

12. That in answering paragraph 20 of the Bill of Complaint, the Respondents admit the allegations contained therein.

13. That in answering paragraph 21 of the Bill of Complaint, the Respondents can neither admit nor deny the [fol. 117] allegations thereof, since they contain no facts and are conclusions of law.

14. That in answering paragraph 22 of the Bill of Complaint, the Respondents deny the material allegations thereof, and in further answering said paragraph, state that the representation in the State Senate of Maryland need not be based on nor reasonably related to the present,

population of the counties and the City of Baltimore, in that representation in the Senate has always been based on geographical considerations and not on population alone (see Constitution of 1776, where the Senate was composed of 15 senators, 9 from the western shore and 6 from the eastern shore; the Constitution of 1851, which provided that each county and the City of Baltimore was entitled to one senator; the Constitution of 1864, which also provided for one senator for each county and allotted the City of Baltimore three senatorial districts, which was subsequently amended by the constitutional amendment of 1922, whereby Baltimore became entitled to six senatorial districts). Further answering said paragraph, the Respondents say that from the earliest times until the present, political subdivisions have been entitled to representation regardless of size, since it has been recognized that it was the town or county which was being represented and not the people directly, in at least one branch of the legislature; and in addition, the Federal Constitution, in creating the Senate of the United States, recognizes the claims of the States as political subdivisions in contrast to direct representation of the people in the House of Representatives; and further answering said paragraph, the Respondents believe that representation in the State Senate of Maryland need not be, in order to meet the requirements of equal protection of law, based solely upon population but may be based upon geographical and other considerations. Geographical representation has also been recognized by the people of the State of Maryland in the composition of the judiciary, in that Article IV, Section 14 of the Maryland Constitution, in prescribing the composition of the Court of Appeals, states that the judges of said Court will be composed of members residing in certain geographical [fol. 118] subdivisions or portions of the State and that the Court's composition is based solely upon geographical considerations. This is further evidence of the desire of the people of the State of Maryland to have representation, whether in the legislative department or judicial department, based upon certain geographical considerations.

15. That in answering paragraph 23 of the Bill of Complaint, the Respondents deny the allegations thereof, and

further answering said paragraph state that the representation in the House of Delegates need not be based solely upon the present population of the counties and the City of Baltimore and there is no allegation of invidious discrimination against the Respondents herein, and that the artificial combination of the counties listed in said paragraph does not in itself show any violation of the Fourteenth Amendment to the United States Constitution.

16. That in answering paragraph 24 of the Bill of Complaint, the Respondents deny the allegations and conclusions contained therein.

17. That in answering paragraph 25 of the Bill of Complaint, the Respondents admit the facts contained therein, but deny any inferences or conclusions from said factual allegations.

18. That in answering paragraph 26 of the Bill of Complaint, Respondents deny the allegations thereof.

19. That in answering paragraph 27 of the Bill of Complaint, the Respondents deny the allegations thereof.

20. That in answering paragraph 28 of the Bill of Complaint, the Respondents deny the legal conclusions contained therein.

21. That in answering paragraph 29 of the Bill of Complaint, the Respondents deny the allegations thereof.

22. That in answering paragraphs 30, 31, 32, 33, 34, 35 and 36 of the Bill of Complaint, the Respondents admit all facts contained therein, but believe that the facts are irrelevant to the legal propositions presented, in that they present matters within the legislative discretion of the General Assembly of Maryland and are not properly reviewable by this Court.

23. That in answering paragraphs 37 and 38 of the Bill [fol. 119] of Complaint, the Respondents admit the constitutional provisions therein contained.

24. That in answering paragraph 39 of the Bill of Complaint, the Respondents admit the result of the referendum

of 1950 regarding the question of whether a constitutional convention should be convened, but further answering said paragraph, state that the total number of votes cast on the question of a constitutional convention amounted to 257,437 out of a total vote of approximately 645,631 (Maryland Manual, 1951-52 Edition, pp. 261, etc.), and that as a result, a majority of the voters *voting at the election* did not approve the constitutional amendment and therefore, there was no mandate of the voters at the 1950 election requiring a constitutional convention.

25. That in answering paragraph 40 of the Bill of Complaint, the Respondents admit the factual allegations contained therein; and in further answering said paragraph, the Respondents refer to the fact that in 1956, the voters at the November General Election in that year approved a constitutional amendment changing the time for submitting the question of a constitutional convention until 1970, and that therefore it is respectfully urged that the voters, by the action, have set 1970 as the next time for submitting to a referendum the question of whether a constitutional convention should be called.

26. That in answering paragraph 41 of the Bill of Complaint, the Respondents deny the inferences contained therein, and further state that they are beyond review by this Honorable Court.

27. The Respondents can neither admit nor deny the allegations of paragraphs 42, 43 and 44 of the Bill of Complaint, since those paragraphs are basically opinions of the Petitioners and are not based upon facts set forth in the Bill of Complaint.

28. That in answering paragraphs 45 and 46 of the Bill of Complaint, the Respondents can neither admit nor deny the allegations thereof, since no facts were contained therein, and said paragraphs merely contain conclusions and opinions of the Petitioners.

[fol. 120] 29. That in answering paragraph 47 of the Bill of Complaint, the Respondents admit the provisions thereof.

30. That in answering paragraph 48 of the Bill of Complaint, the Respondents admit the allegations thereof, with the exception that the Secertary of State is now Lloyd L. Simpkins and that the Attorney General is presently Thomas B. Finan.

31. That the Respondents admit the allegations of paragraphs 49 and 50 of the Bill of Complaint.

32. That in answering paragraph 51 of the Bill of Complaint, the Respondents state that it is their duty under their constitutional oath to defend and uphold the Constitution and laws of this State until declared unconstitutional by some court of competent jurisdiction, and that the demand made upon the Respondents would cause them to violate their sworn duty to uphold the Constitution and laws of this State.

33. That in answering paragraphs 52 and 53 of the Bill of Complaint, the Respondents deny the allegations as well as the conclusions contained therein.

Further answering said Bill of Complaint, the Respondents deny all allegations not specifically admitted or otherwise answered.

Wherefore, your Respondents pray that the Bill of Complaint be dismissed, with appropriate costs.

Thomas B. Finan, Attorney General; Joseph S. Kaufman, Deputy Attorney General; James P. Garland, Assistant Attorney General, 1201 Maryland National Bank Bldg., Baltimore 2, Maryland, Telephone: 539-5413, For the Respondents.

[fol. 121] Certificate of Service (omitted in printing).

RESPONDENTS' EXHIBIT NO. 1 TO ANSWER

See Opposite ☞

Table 2.—Population of Maryland, by Counties: 1960 and 1950

County	Population 1960	1950
The State	3,100,689	2,343,001
Allegany	84,169	89,556
Anne Arundel	206,634	117,392
Baltimore	492,428	270,273
Baltimore City	939,024	949,708
Calvert	15,826	12,100
Caroline	19,462	18,234
Carroll	52,785	44,907
Cecil	48,408	33,356
Charles	32,572	23,415
Dorchester	29,666	27,815
Frederick	71,930	62,287
Garrett	20,420	21,259
Harford	76,722	51,782
Howard	36,152	23,119
Kent	15,481	13,677
Montgomery	340,928	164,401
Prince George's	357,395	194,182
Queen Anne's	16,569	14,579
St. Mary's	38,915	29,111
Somerset	19,623	20,745
Talbot	21,578	19,428
Washington	91,219	78,886
Wicomico	49,050	39,641
Worcester	23,733	23,148

[fol. 123] [File endorsement omitted]

IN THE CIRCUIT COURT FOR
ANNE ARUNDEL COUNTY, MARYLAND

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—Filed May 16, 1962

Now Come the petitioners, through their solicitors, pursuant to Rule 610 of the Maryland Rules of Procedure, to allege and to move the Court as follows:

1. Respondents answered the bill of complaint on May 14, 1962.
2. A hearing on the merits is scheduled for May 21, 1962.
3. The bill of complaint, with Exhibits A through H attached, and the answer, with Exhibits attached, establish that there are no genuine issues of material fact raised for determination by the Court.
4. There remain for decision by the Court at the hearing now scheduled for May 21, 1962, only issues of constitutional law, i.e., whether the present representation provided for in the General Assembly of Maryland by virtue of Article III, Secs. 2 and 5 thereof, constitutes the invidious discrimination against voting rights which Section 1 of the Fourteenth Amendment to the Constitution of the United States forbids.
5. Petitioners believe that they are entitled to judgment with respect to the above stated issues of law, as authorized by Rule 610d1 of the Rules of Procedure.

Wherefore, petitioners pray that:

Following hearing on May 21, 1962 of the issues of law presented for decision, the Court grant summary judgment [fol. 124] declaring that the representation now provided for in the Senate of Maryland by Article III, Section 2, of the Maryland Constitution, discriminates against and dilutes voting rights of these petitioners and other citi-

zens of Maryland similarly situated, in a manner prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

B. Following hearing on May 21, 1962 of the issues of law presented for decision, the Court grant summary judgment declaring that the representation now provided for in the House of Delegates of Maryland by Article III, Section 5, of the Maryland Constitution, discriminates against and dilutes the voting rights of these petitioners and other citizens of Maryland similarly situated, in a manner prohibited by Section 1 of the Fourteenth Amendment to the Constitution of the United States.

C. The Court, following entry of the summary judgments, as prayed for herein, retain jurisdiction of the cause, as directed by the Court of Appeals of Maryland in its decision and mandate of April 24, 1962, until the General Assembly of Maryland, at a special session thereof convened for such purpose, enacts legislation, or approves a proposed amendment or amendments to the Maryland Constitution, that would eliminate the invidious discrimination which now exists as a result of the grossly malapportioned representation provided for in both the Senate and House of Delegates of Maryland by virtue of Article III, Secs. 2 and 5 respectively.

Petitioners will serve and file a memorandum of law in support of this motion on or before May 21, 1962.

Respectfully submitted,

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland;

Johnson Bowie, County Office Building, Towson, Maryland;

John B. Wright, 12 Church Circle, Annapolis, Maryland;

David MacDonald, 8485 Fenton Street, Silver Spring, Maryland, Solicitors for Petitioners.

[fol. 125] Certificate of Service (omitted in printing).

[fol. 126]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 Equity

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

OPINION—Filed May 24, 1962

Question Presented

Does the present composition of the State Senate and/or the House of Delegates of Maryland as provided by Article 3, §§ 2 and 5 of the Maryland Constitution invidiously discriminate against the Petitioners and therefore violate the equal protection clause of the United States Constitution?

How Question Arises

The Bill of Complaint was filed in this Court on August 12th, 1960 by the Maryland Committee for Fair Representation (hereinafter called "Committee) and seven citizens, taxpayers and voters from Montgomery, Anne Arundel, Baltimore and Prince George's Counties (hereinafter called "large" or "suburban" Counties) and Baltimore City against the Governor of Maryland, Board of State Canvassers, Secretary of State, Comptroller of the Treasury, Attorney General, Treasurer, Clerk of the Court of Appeals of Maryland (being members of the State Board of Canvassers) and the Board of Election Supervisors of Anne Arundel County.

Briefly, it is contended that the present system of representation in the Maryland Legislature, whereby the voters of the four (4) suburban Counties and Baltimore City receive representation below that to which they would be entitled if representation was based on population, whereby their right to vote is diluted in violation of the equal [fol. 127] protection and due process clause of the Fourteenth Amendment.

In September, 1960, Demurrers were filed by the Defendants claiming, inter alia, that reapportionment is a political question and as such is not a justiciable controversy but rests with the discretion of the Legislature or the people. The Demurrers were argued on November 12, 1960. On February 21, 1961, this Court, under the ten controlling decisions of the United States Supreme Court, dismissed the Bill of Complaint. This decision was duly appealed to the Court of Appeals of Maryland and argued before five of the Judges of that Court on October 17, 1961. On December 12, 1961, the case was re-argued before seven Judges.

On March 26, 1962, the Supreme Court of the United States in a somewhat similar case, arising from Tennessee, overruled the existing law and in extensive and separate Opinions of 96 pages (6 to 2 decision) held that the District Court possessed jurisdiction of the subject and that a justiciable cause of action was stated. (Baker v. Carr, 7 L. ed. 2d 663.)

On April 25, 1962, the Court of Appeals of Maryland, following the decision of the Supreme Court, reversed the Decree of this Court, and remanded the cause for further proceedings. Judge Henderson filed a dissenting Opinion in which Judge Horney concurred.

Appellate Opinion

The Majority Opinion of the Maryland Court of Appeals, written by Judge Prescott, settles many questions raised in the Petition so that my present function is somewhat limited and narrow. Among other questions, the Appellate Court decided:

(a) That this Court has the power and duty to determine the important question raised by the Petition:

(b) That it is not possible or advisable to provide a precise and inflexible rule or formula for proper representation in the Legislature:

(c) Maryland Law does not require that representation [fol. 128] be based upon a mathematical ratio or population or of eligible voters:

(d) That the tenure and terms of the present members of the General Assembly cannot be changed:

(e) That it would be illegal as suggested by the Petitioners to provide "at large" election of the members of the Legislature.

(f) That the Chancellor should not enjoin anyone at this time, but should retain jurisdiction so that he can grant injunctive relief before the November, 1962 General Election, should the situation then so justify.

(g) That the representation in the Legislature does not violate the Civil Rights Statute, nor § 2, Article XIV of the Maryland Constitution (1950) and Articles 1, 7 and 45 of the Maryland Declaration of Rights.

Chancellor's Hearing

Under the aforesaid Opinion of the Appellate Court, it is my function and duty to receive evidence and determine whether or not an invidious discrimination exists with respect to representation in either or both Houses.

The material allegations of fact in the Bill of Complaint and the exhibits attached thereto were admitted by the Defendants in their Answer. The Defendants denied opinion allegations, conclusions of law and certain inferences. Furthermore, they offered in evidence an official census return (Respondent's Ex. #1); State of Maryland registration figures as of October 1, 1960 (State's Ex. #"A"). State's Election returns for Governor, November 4, 1958 (State's Ex. #B). State Election returns for President of the United States, November 8, 1960 (State's Ex. #"C"). Moreover, in their Answer, Respondents repeatedly state that the combination of the four suburban Counties and Baltimore City create an artificial combination of political subdivisions which is both irrelevant and immaterial, and, in conclusion, request that the Bill of Complaint be dismissed with appropriate costs.

No oral testimony was offered by any of the parties but [fol. 129] arguments were made and briefs submitted by the Solicitor for the Petitioners, the Attorney General and his Deputy on behalf of Governor Tawes and the members of the State Board, Solicitor for the Board of Election Super-

visors of Anne Arundel County, and Solicitors on behalf of several amicus curiae. A Motion for Summary Judgment was also filed on behalf of the Petitioners under Maryland Rule 610.

Basic Constitutional and Equitable Principles

1. First and foremost, it must be remembered as explained by Judge Prescott that the provisions of the Federal Constitution as interpreted by the Supreme Court of the United States are conclusive and constitute the Supreme Law of the entire Country. Wherefore, we find the following in both the Federal Constitution (Art. VI, §2) and the Maryland Constitution (Art. 2, Declaration of Rights):

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or law of this State to the contrary notwithstanding."

2. That the Judiciary of this State has not only the authority but the duty to declare laws and enactments invalid when they transcend constitutional limits.

3. Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the Petitioners.[1]

4. To declare a section of the State Constitution invalid, as being in violation of the Equal Protection clause of the Fourteenth Amendment, the fact of equality is not enough [fol. 130] as the enactment must be arbitrary, unreasonable, oppressive or an unjust discrimination.[2]

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[1] *McGowan* v. *Md.*, 366 U.S. 420-426; *Johns Hopkins University* v. *Williams*, 199 Md. 382, 86 A2 899; *Norris* v. *Baltimore*, 172 Md. 667, 192 A. 531.

[2] *Pope* v. *Williams*, 98 Md. 59 56 A. 543-aff. 193 U.S. 621-48 L. ed. 87; 5 M.L.E., §231-233 and cases cited therein.

5. History is recognized as a pertinent consideration in the making of a constitutional determination.[3]

6. Geography, to a lesser extent, is also recognized as a pertinent consideration in the making of a constitutional determination.[4]

Composition of State Senate and House of Delegates

With these principles in mind, let us consider whether or not the present composition of the Senate and/or the House of Delegates invidiously discriminates against the Petitioners.

Although different principles may be applied to answer the question regarding the Senate and the House, they should be considered together. This is because a different answer could be made if the Maryland General Assembly were unicameral with one of the compositions instead of bicameral with both compositions.

Counsel during their arguments stated that they knew of no precise formula to determine or define "invidious discrimination" in constitutional issues. Webster's Dictionary defines "invidious" as "tending to excite hatred, ill will or envy; likely to give offense; especially unjustly discriminating or repugnant."

In State of *Oklahoma* v. *Williamson*, 316 U. S. 535, 86 L. ed. 1655, the Supreme Court held that "when the law lays unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made a "discrimination" as invidious as if a particular race or nationality had been selected for oppressive treatment."

In determining whether there is invidious discrimination in this case, I believe that the extent of the disparity is im- [fol. 13F] portant; also, whether the disparity between the Counties or Legislative Districts has any reasonable justification; whether the action of the State Legislature or the constitutional enactment is unjustly arbitrary and unreasonable, keeping in mind, at the same time, that identity of

[3] Judge Prescott's Opinion, p. 23, citing *Frank* v. *Md.*, 359 U.S. 360 and illuminating footnote No. 11.

[4] Judge Prescott's Opinion, p. 23.

treatment is not required if the classification or disparity of voting rests on real and not feigned differences.

Justice Smith aptly said in his prevailing Opinion in the famous Michigan decision:

> "The Constitution of the United States does not require, as we construe equal protection, that there be a precise mathematical correlation between the weights accorded votes. It does not demand the precision of a physicist. But it does demand that the voters' right to substantial equality not be subject to gross, or to wilful and deliberate, deprivation, and it is no more palatable to us that it be accomplished on a grand scale than through the petty larceny of the ward-healer."

Likewise, Justice Kavanagh, in another prevailing opinion, on page 71, quoted from the Wisconsin case[5] to the effect that perfect exactness in the apportionment, according to number of inhabitants is neither required nor possible but that when the wide departure cannot possibly be justified by the exercise of any judgment or discretion on the part of the Legislature, its action is void.

In *MacDougall* v. *Green*, 335 U. S. 281, 98 L. ed. 3, 7, the Supreme Court in a per curiam Opinion, said:

> "• • • To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, [fol. 132] for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the

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[5] *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W.2 63, at p. 93, remanded by Supreme Court on April 23, 1962; 8 L. ed.2 1.

[6] *State* v. *Cuningham*, 81 Wisc. 440 at p. 484; 51 N.W. 724, 739.

polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Article III, §1 of the Constitution of Maryland provides:

"The Legislature shall consist of two distinct branches, a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland."

In my opinion, the use of the word "distinct" in this Section means a substantial or material difference and not merely a slight difference in age eligibility as provided under §9 of the same Article.

Section 2 is succinctly stated by Judge Prescott as follows:

"Section 2 provides, inter alia, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election."

Section 5 is as follows:

"The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot, and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

[fol. 133] Section 6 of the same Article also provides:

"The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the legislative districts of Baltimore City, respectively, to serve for four years from the day of their election."

The historic distinction between the two Houses in Maryland was fully explained in footnote 11 of the Appellate Court's Opinion, so will not be repeated. I feel, however, that one of the Houses (in Maryland, the Senate) can be constitutionally based upon area and geographical location regardless of population or eligible voters. Such an arrangement protects the minorities. It prevents hasty, although popular legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed to the States by Article IV, §4 of the United States Constitution. It preserves the checks and balances in the State Government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar.

It is true that the great men of the Constitutional Convention of 1787, after lengthy debate, reached a compromise by providing for proportional representation in the Lower House and an equal vote for the States, regardless of population in the Upper House.[7]

Admitting that the plan was a compromise, must it not be conceded that it produced the government under which our great Country has prospered for almost two hundred years?

I do not agree with Petitioners' argument that the States of the Union are sovereign in contrast to the Counties which are but political divisions of the State. States have not been sovereign or independent since the close of the Revolution in 1783 and we cannot turn the clock back to make them so. State sovereignty is contrary to the modern philosophy and operation of government and diminishes with each passing year.

[fol. 134] I am inclined to agree with the Defendants that the combination of the four suburban Counties and Baltimore City for purposes of comparison is artificial. There is no invidious discrimination against Baltimore City in the House and it has a distinct advantage over all the sub-

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[7] *Krause*, The United States, p. 454-459.

urban Counties in the Senate.[8] Anne Arundel County seems to be on the border line but is rapidly growing. It may be pointed out that the inclusion of Baltimore City improperly magnifies the various tax receipts and distributions enumerated in Plaintiffs' Exhibit #2.

The various examples of malapportionment or unfair distribution were discussed in my original opinion and by the Appellate Court, so will not be repeated.

Therefore, without prolonging the matter further and acting as Chancellor under equitable principles, I have no hesitancy in finding from the facts presented that the people of Baltimore, Prince Georges and Montgomery Counties are invidiously discriminated against under the existing law. It necessarily follows that Article III, §5 of the Maryland Constitution must be declared unconstitutional and void as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. In my opinion, the facts are insufficient to establish invidious discrimination against the people of Baltimore City. The question is close in Anne Arundel County, but as the equities must be weighed in favor of constitutionality, I find no invidious discrimination.

Although for the reasons heretofore stated, I do not believe that §2 of Article III is unconstitutional I have decided not to make a determination of the question at this time. The Legislature, the Executive, and the People will have little respect for judicial decisions unless there is some finality in these decisions.

[fol. 135] An Order will therefore be signed in conformity with this Opinion and, as suggested by the Appellate Court.

1. Declaring that §5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating sole-

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[8] The applicability of the Federal System to the State of Maryland is of course weakened by the division of Baltimore City into legislative districts with six (6) Senators instead of one (1). Such an arrangement was probably thought necessary because of the unique position of the City at that time. I do not consider it feasible to discuss the question further at this time, except to note that Los Angeles, with a population of over five (5) million, had but one (1) State Senator.

ly to the apportionment of membership of the House of Delegates insofar as it applies to the General Election of November, 1962, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, and therefore null, void and of no effect in regards to said Election, said Declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

2. Declaring that the members of the General Assembly have the power, if and when called into Special Session by the Governor, and such action be deemed appropriate by it to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

3. Declaring that the members of the General Assembly, if and when called into Special Session as aforesaid, are empowered in their discretion to propose a constitutional amendment providing for reapportionment.

4. Withholding injunctive relief at this time, but retaining jurisdiction in order that appropriate injunctive relief can be granted before the November, 1962 Election, should the situation at that time so justify.*

Solicitors for the respective parties may submit an appropriate Order in conformity with the above.

O. Bowie Duckett, Judge.

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* I regret that I have not had sufficient time to write a more enlightening Opinion on this important question. The outstanding ability and exhaustive research of many members of the judiciary and writers are amazing and worthy of the highest commendation. This difficult question is now up to the members of the Legislature who are expected to rise above their personal or local views and enact legislation beneficial to the welfare of our State as a whole. Less would be below the exalted standing of the Legislature, as the predominant branch of our Government.

[fol. 136]

IN THE CIRCUIT COURT OF ANNE ARUNDEL COUNTY

No. 13,920 Equity

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

DECREE—May 28, 1962

This Cause having been remanded for further proceedings in conformity with the Opinion of the Court of Appeals of Maryland, filed April 25, 1962 (*228 Md. 412*), and having come on for hearing, Exhibits were filed, Solicitors heard, Briefs submitted and pleadings read and considered;

Whereupon, it is Ordered this 28th day of May, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, and by authority of this Court for the reasons set forth in the Court's Opinion of May 24, 1962 (*Daily Record*, May 28, 1962), Adjudged, Ordered and Decreed that:

(1) § 5 of Article III of the Constitution of Maryland, and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates, in so far as they apply to the General Election of November, 1962, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, be, and the same are hereby, declared null, void and of no effect in regards to said Election; said declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

(2) In regards to § 2 of Article III of the Constitution of Maryland, the Chancellor makes no finding at this time, but retains jurisdiction and reserves the right for a future Decree under established equitable practice.

[fol. 137] (3) The members of the General Assembly in Special Session, and in any subsequent Session, have the power in their discretion to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

(4) The members of the General Assembly in Special Session, and in any subsequent Session, are empowered likewise in their discretion to propose a constitutional amendment providing for reapportionment.

(5) Injunctive relief is hereby withheld at this time, the Chancellor retaining jurisdiction in order that appropriate relief can be granted before the November, 1962 Election, should the situation at that time so justify; costs to be paid equally by the respective parties.

O. Bowie Duckett, Judge.

[fol. 138]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

[Title omitted]

APPEAL

Mr. Clerk:

Please enter the Appeal of the plaintiffs from the decree dated May 28, 1962 in this cause.

Alfred L. Scanlan, John B. Wright, Johnson Bowie, David MacDonald, Solicitors for Plaintiffs.

[fol. 139]

IN THE COURT OF APPEALS OF MARYLAND

No. 94, September Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

v.

J. MILLARD TAWES, GOVERNOR, et al., Appelles.

ORDER DIRECTING REMAND OF CASE FOR ENTRY OF PROPER DECREE—June 8, 1962

The Court having considered the Appellants' Motion to Accelerate the Appeal herein, the Appellees' Motion to Dismiss the Appeal, and the Appellants' Answer to the Appellees' Motion, it is, this 8th day of June, 1962, Ordered by the Court of Appeals of Maryland that this case be remanded to the Circuit Court for Anne Arundel County, with directions to enter a decree promptly declaring Section 2 of Article III of the Constitution to be valid or invalid, as said Court may determine.

Frederick W. Brune, Chief Judge.

[fol. 140]

IN COURT OF APPEALS OF MARYLAND

No. 94, September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION et al.

v.

J. MILLARD TAWES, GOVERNOR et al.

Appeal from the Circuit Court for Anne Arundel County.

Filed: May 29, 1962.

May 29, 1962: Motion filed to advance hearing, etc.

May 31, 1962: Motion to dismiss appeal filed.

June 6, 1962: Answer to motion to dismiss filed by appellants.

June 8, 1962: Order of Court filed remanding case to lower court with directions to enter a decree promptly declaring Section 2 of Article III of the Constitution to be valid or invalid, as said court may determine.

MANDATE

STATEMENT OF COSTS:

In Circuit Court:

Record	$15.00
Stenographer's Costs	25.00

In Court of Appeals:

Filing Record on Appeal	$20.00
Printing Brief for Appellant	
Reply Brief	
Portion of Record Extract—Appellant	
Appearance Fee—Appellant	
Printing Brief for Appellee	
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	

[fol. 141]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

SUPPLEMENTAL OPINION—June 28, 1962

On June 8th, 1962, the Court of Appeals of Maryland remanded the above case to this Court with directions to

enter a decree declaring Section 2 of Article III of the Maryland Constitution to be valid or invalid, as the Court may determine. This Court must therefore determine whether the Maryland Senate is a legal body.

Since the filing of my Opinion on May 24th, holding that apportionment in the House of Delegates was unconstitutional but making no determination as to the Senate, the General Assembly at the call of the Governor has met in Special Session and on May 31st, 1962 enacted reapportionment legislation which added nineteen (19) members to the House of Delegates. It appears, therefore, and the Petitioners have conceded, that the Lower House has been legally reapportioned according to population. Wherefore, the present issue is much simpler than originally presented when neither House was apportioned on a population basis. The narrow issue now presented is whether that Section of the Maryland Constitution providing for area representation in the Senate is valid or invalid. Stating the question differently, does the Fourteenth Amendment, which guarantees equal protection, require that a State having one House of its Legislature fairly based on population, shall also base its other House on population?

Initially, it must be recognized that it is not the function or duty of a nisi prius court to protect its personal views by changing the law but should follow the existing law and [fol. 142] legal precedents if possible. The Chancellor should not engage in judicial experimentation or void a section of the State Constitution unless clearly illegal. Inequality of representation is not enough for this Court to declare an enactment invalid. There must be unjust or invidious discrimination.[1]

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[1] While the Supreme Court of the United States, and to a lesser extent, the States' Supreme Courts, may alter existing law because of a change in conditions or a change in the viewpoint of society (sometimes called "following the election returns") this function is not one for a trial court. As vividly expressed by one of the greatest Judges of all times: "We have * * * no right as a presently inferior Court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Judge Learned Hand, *Spector Motor Serv.* v. *Walsh*, 139 F.2d 803, 823; also quoted *Spector Motor* v. *McLaughlin*, 323 U.S. 101, 89 L.ed. 100 and *Scholle* v. *Hare*, 104 N.W.2d 63,

Up to the present, it must be conceded that there is no authoritative decision holding that both Houses of a Legislature must be based on population. Just as recent as May 25th, Judge Tuttle, speaking for a three-Judge Court,[2] after stating that there is some basis for Plaintiff's contention, said:

> "However that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the Plaintiff his constitutional rights the State Legislature must be constituted as two Houses, both of which are elected according to population."

The Solicitor General of the United States in discussing the effect of *Baker* v. *Carr* before the Tennessee Bar Association on June 8th, 1962, said in part:

> " * * * In Baker v. Carr we also argued that the starting point in determining the constitutionality of any apportionment should be *per capita* equality of representation and that any serious departure from this standard is invalid unless shown to have a rational [fol. 143] justification. Both points were largely based upon history, for history is a powerful influence in constitutional law. State constitutions reflect the extent to which the idea of equality of voting power is imbedded in our political heritage, as I indicated above. They also suggest some of the justifications for diverging from exact numerical equality—the claims of historically separate units such as towns and counties to have equal recognition, the desirability of distributing political power geographically, the need to prevent a single large city or two from dominating an entire State; in New Hampshire seats in the Senate are allocated in the ratio of direct taxes paid. I do not mean to suggest how the question should be decided, but it

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at p. 122. Likewise, as Judge Murrah said: "It is not the function of this Court to psychoanalyze the justices of the Supreme Court in order to divine the trend of decisions." (145 F.Supp. 541.)

[2] *Toombs* v. *Fortson*, U.S. Dist. Ct. N.D.Ga., 30 L. Week 2606.

would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions *provided that the departure from equal representation in proportion to the population is not too extreme.* But surely a very strong argument can also be made that there must be representation proportionate to population in at least one branch of the legislature. * * * "

Difficulties of the Problem

The combination of several factors makes the determination of this involved problem more difficult. Among these are:

(1) The important and far reaching problem, involving the control by one co-ordinate branch of the State Government over another, presents a most delicate question.

(2) Until the recent pronouncement of *Baker* v. *Carr*,[4] the Court had considered the question "political" so there are few recognized precedents or guideposts to follow.

(3) The Supreme Court in *Baker* v. *Carr* laid down no [fol. 144] rules as to what apportionment of representation satisfies the requirements of the Fourteenth Amendment.

(4) The long established reluctance of the judiciary (regardless of its power) to compel action on the part of the Legislature. In this regard, it may be noted that Judges are trained to interpret laws, not to propose or prepare legislation, which function has heretofore been performed by the Legislature.

(5) Unlike many other States, Maryland does not provide for reapportioning the General Assembly or for basing the Senate's representation on population.

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[3] *Comm.* v. *Tawes*, 228 Md. 412; 180 A.2d 656.

[4] 369 U.S. 186; 7 L.ed.2d 663.

(6) The State of Maryland should be "allowed every reasonable latitude * * *, and any discrimination therein will not be set aside if any state of facts reasonably may be conceived to justify it."[5]

(7) Controversies such as this where distinguished Appellate Judges of equal experience and ability reach different conclusions, not on the general law but on their individual beliefs, philosophies or background, tend to establish a government of men and not of law and therefore contrary to our concept of sound government, and in violation of Canon 20 of Judicial Ethics.[6]

Contentions Made

Several strong arguments have been made by the Petitioners in their written and oral arguments before this Court. Points of little merit have also been advanced. For [fol. 145] example, the Petitioners state that maximum dilution of voting rights with respect to the Maryland State Senate reach as high as 33 to 1, whereas in the Michigan case of *Scholle* v. *Hare*, the maximum dilution is 15 to 1. These figures mean very little as the maximum dilution in the United States Senate is 75 to 1. Regardless of this, it must be conceded that if representation in the Maryland Senate is based on population there exists invidious discrimination.

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[5] *Comm.* v. *Tawes*, 228 Md. 412, citing *McGowan* v. *Md.*, 366 U.S. 420, 426 (1961).

[6] *Judicial Canon 20. "Influence of Decisions Upon the Development of the Law."*

"A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the systems of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law."

Petitioners also contend in their motion that in the United States Senate a majority of the population has a majority of the representation, which is not the case in the Maryland Senate. This statement is erroneous. According to the 1960 Census, the 26 less populated States have a population in round figures of 31 million, so these States with 17 per cent of the population have 52 per cent of the representation.

Sovereignty

Petitioners' main point is their contention that Maryland should not continue under the Federal Plan because of State sovereignty in contrast to the Counties which are but political divisions of the State. *Daly* v. *Morgan*, 69 Md. 460. My original Opinion to the contrary is stated to be radical. By the great weight of modern authority, States are not now possessed of true or external sovereignty. They do possess internal sovereignty, or at least the right to many of the attributes of internal sovereignty, subject to restrictions imposed by or arising from the Federal Constitution.[7]

Sovereignty in its full sense imports the supreme, absolute and uncontrollable power, subject to no other state, nation or potentate on earth. While a state may still have [fol. 146] some attributes of sovereignty, all must concede that they have been greatly diminished.[8]

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[7] *State* v. *Hyman*, 98 Md. 596, 613; *81 C.J.S.*, States, §2, 858; *Comm.* v. *Hague*, 25 F. Supp. 127; Modified on other grounds 101 F.2d 774; 307 U.S. 496.

[8] *Chrisholm* v. *Ga.*, 2 U.S. 419-455; 1 L.ed.440. *People* v. *Toole*, 86 Pa. 224; 35 Colo. 225. *Moore* v. *Smaw*, 17 Cal. 199-218; 79 Am.Dec. 123. *1 Blackstone*, Commentaries 241-242.

[9] The original thirteen States have not been truly sovereign and independent since the close of the Revolution. The Civil War settled finally and conclusively that the States are merely indispensable units of a single national sovereign. Developments since 1933 have greatly increased the dominance of the national government over state government. States cannot enter into contracts or compacts with other States without Federal permission. They may not deport undesirables found in their midst. The National Government now determines the planting acreage of crops and the conditions and prices in the marketing of milk. Many other

Petitioners therefore contend that because of this so-called "state sovereignty," it is legal and reasonable to base the United States Senate on area alone, but that it is illegal and unreasonable to use the same factor in determining senate representation in Maryland.

Petitioners correctly argue that this Government was a result of a compromise and infer that a better government would have been established if it had not been for the smaller States.[10] Disregarding the fact that the people under this document have prospered for almost 200 years to become the greatest country on earth, I cannot believe that the mere use of the word "sovereignty" can as a practical matter sustain the Federal System and invalidate the States'. If the Petitioners do not believe in the federal or republican form of government but would prefer a pure democracy or town meeting system, they should say so [fol. 147] directly and not masquerade under the guise of state sovereignty.

If our Federal System of checks and balances is good for the Nation, it likewise should be good for the States. While a State undoubtedly possesses more attributes of sovereignty than a Charter County, the difference is largely one of degree and of no practical importance in determining the validity and effectiveness of the system itself. It is merely a play on words to contend that the word "sovereignty" should determine the issue. The desired effect of

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examples of the ever increasing power of the National Government can be given. *Encyclopedia Britannica*, Vol. 2 United States of America, p. 764. *U.S.* v. *Morelock*, 124 F. Supp. 932.

[10] Many do not agree with the position taken by the Petitioners. James Madison, the father of the Constitutional Convention, was of the opinion that there should be equality of men in the House and equality for the States in the Senate, by which means the citizens of the States would be represented both individually and collectively. Checks and balances to curb sudden impulses of mere majorities would thereby be attained.

Sixty years after the Constitutional Convention of 1787, John C. Calhoun paid the smaller States the following tribute: "It is owing mainly to [certain small States] that we have a Federal instead of a National (that is unitary) government,—the best government instead of the worst and most intolerable."

preventing hasty and ill conceived legislation would be attained in the same manner and just as completely in the General Assembly of Maryland as it is in the Congress of the United States.

Legislative Districts

In my opinion, Petitioners' most impressive argument is that the State of Maryland abandoned the federal plan by dividing the City of Baltimore into legislative districts. As stated in original Opinion, the earlier change was probably due to the unique position of Baltimore City at that time. Not only was its population greater than the rest of the State combined, but the City is in quite an unique position due to the fact that it is an independent City or County in itself. It is, therefore, not merely a part of several counties, which is usually the case of other large cities in this Country, such as New York City, for example. The concentrated masses in Baltimore were therefore given several Senators by dividing the City into legislative districts, which was similarly accomplished in the other large cities by being in several counties.

Petitioners also attempt to distinguish the Maryland and Federal Plan by stating in case of the United States, the Lower House is based strictly on population, while in Maryland, it is not. As a matter of fact, the House of Representatives is not based strictly on population because 5 of the least populated States are allocated 1 representative in Congress, even though not entitled under the population ratio. Indians who pay no taxes are also not counted.

[fol. 148] Maryland's Position

The Government of the State of Maryland presents a different problem from that of many other States which have been considered by the Courts. Our State Constitution, contrary to that of others, makes no provision for reapportionment. Our Constitution expressly provides for two distinct branches of the General Assembly. Such required bicameralism presupposes two different and distinct representation bases for its construction and utilization.

So far as history or tradition is a controlling factor, Maryland stands in the forefront. The Senate of the United States itself was formed on the model of that of Maryland.[11]

Representation Based on Population

While representation in the Senate in a number of States is based on population, because of the constitutional requirements of those States, this factor is not universal. Other bases for apportionment are county, district, town and parish areas; male inhabitants, legal voters, direct taxes paid and restricted population by excluding servicemen, aliens and Indians. State senates vary in membership from 17 each in Delaware and Nevada to 67 in Minnesota.[12]

Conclusion

Briefly, the reasons given in the original Opinion that the Maryland Senate can be constitutionally based upon area and geographical location regardless of population, were:

(1) The system protects minorities and prevents hasty, although, popular, legislation at the time.

(2) It preserves checks and balances and the republican form of government.

(3) It is based on history, tradition and reason.

[fol. 149] Nothing has transpired since this Decision to change my mind. Petitioners propose to increase the Senate by 14 members at this time.[13] Under this plan, it would again be necessary to increase the Senate upon an increase in population.

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[11] *The Journal of the Constitutional Convention*, published by G. P. Putnam Sons, 1903, p. 202.

[12] *The Book of the States*, 1960-61, pgs 31 54-58; *43 Mich. L. Rev.*, p. 1091-1112; *17 Law and Contemporary Problems*, pgs 253-469, (1952).

[13] Under this proposal, Baltimore City's representation in the Senate would be increased from 6 to 9; Baltimore County from 1 to 5; Prince George's and Montgomery Counties, each, from 1 to 4, and Anne Arundel County from 1 to 2, thereby increasing the total membership of the Senate from 29 to 43.

Increasing the size of a legislative body is generally not desirable. It sacrifices legislative efficiency and adds to the costs.[14] Petitioners have lately taken the position that if the Maryland Senate cannot be based strictly on population, it should be based partly on population and partly on area. They further state that this modified or hybrid plan is beneficial as it prevents hasty legislation and permits a second look before a law is enacted. The plan is used in a number of States in compliance with their Constitutions, and is generally valid. I feel that this plan merely dilutes or diminishes the benefits obtained under the Maryland and Federal System and would change this State's established Government. It is a plan which Maryland has the power to adopt but which it cannot be compelled to do. Each of the States has the right to determine and establish their own system of representation, provided there is some reasonable ground or justification for this determination. In addition to population, factors such as area, history, geography and tradition have always been recognized as rea- [fol. 150] sonable when applied to one house of a legislature. In my opinion, Article III, Section 2 of the Maryland Constitution is therefore valid and constitutional.

O. Bowie Duckett, Judge.

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[14] If, because of changed conditions, the General Assembly decides that it should follow the Federal Plan strictly, it could reduce Baltimore City's membership in the Senate to 1 and continue a single Senator for each County. Another, and perhaps more feasible, plan properly related to population would be to reduce Baltimore City (pop. 940,000) to 4 Senators, then divide Baltimore County (pop. 492,000) into 2 legislative districts with a Senator for each and continue all other Counties for the present with one Senator. It could then be provided that when any County reached a population of approximately 500,000, it would likewise be entitled to two Senators. Projected population studies show that this would be attained by Montgomery and Prince George's Counties in 1970.

[fol. 151]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

DECREE—June 28, 1962

The above matter having come on for hearing, in compliance with the Order of the Court of Appeals dated June 8, 1962, counsel were heard, Memoranda submitted, and the Court, for the reasons set forth in its Supplemental Opinion, is of the opinion that Article III, Section 2 of the Constitution is valid.

Whereupon, it is, this 28th day of June, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, Adjudged, Ordered and Decreed that Section 2 of Article III of the Constitution of the State of Maryland be, and the same is hereby, declared to be valid and constitutional; costs to be paid by the Petitioners.

O. Bowie Duckett, Judge.

[fol. 152]

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

[Title omitted]

APPEAL

Mr. Clerk:

Please enter the Appeal of the plaintiffs from the decree dated June 28, 1962 in this cause.

Alfred L. Scanlan, John B. Wright, Johnson Bowie, David MacDonald, Solicitors for the Plaintiffs.

[fol. 172]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, GOVERNOR, et al.

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

PER CURIAM ORDER OF AFFIRMANCE—July 23, 1962

Brune, C. J. and Prescott and Marbury, JJ. dissent.

[fol. 173] It appearing to a majority of the Court, for reasons to be stated in an opinion hereafter to be filed, that the decree appealed from should be affirmed, it is Ordered by the Court of Appeals of Maryland, this 23rd day of July, 1962, that said decree be and it is hereby affirmed, the appellants to pay the costs.

William L. Henderson, Judge.

[fol. 174] [File endorsement omitted]

IN THE COURT OF APPEALS OF MARYLAND

September Term, 1962

No. 140 (Advanced)

Sept. 11, 1962—Motion Denied

William L. Henderson, Asso. Judge

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al., Appellees.

MOTION FOR REARGUMENT (Filed August 2, 1962) AND DENIAL THEREOF (September 11, 1962)

Now Come the appellants, through their attorney, to state to this Honorable Court, as follows:

This case was argued before the Court on the morning of July 23, 1962, after the appeal had been advanced and the hearing date specially set by this Court's order of July 2, 1962. In the late afternoon of that day, the Court issued a *per curiam* order, affirming the decision below, with Chief Judge Brune and Judges Prescott and Marbury dissenting. No opinion has been filed as of the date of the submission of this motion for reargument. Pursuant to Rule 850(a) of the Maryland Rules of Procedure, appellants respectfully move the Court for reargument of the case on the grounds stated in the ensuing sections of this motion. The required fee has been proffered.

I

Recent Relevant Cases and Related Developments

In the days immediately preceding, and during the days following, argument before this Court on July 23, 1962,

a number of pertinent decisions have been handed down by Federal and State courts. Most of these involved a required reapportioning of the Senate of a State legislature. They are:

A. *Alabama.* On July 21, 1962, the United States District Court for the Middle District of Alabama issued an opinion ordering the temporary reapportioning of both [fol. 175] the Senate and the House of Representatives of Alabama on a basis related to population. *Sims* v. *Frink* (C.A. No. 1744, N.) —— F. Supp. —— (M.D. Ala., July 21, 1962). At the time of argument before this Court, the appellants had only abbreviated newspaper reports of the Alabama ruling through which to bring that decision to the attention of this Court. *The New York Times,* July 21, 1962, p. 1. Appellants have now secured a copy of the Alabama court's opinion, and have attached a copy thereof to this motion as Annex 1.

The Federal Court in Alabama refused to accept the attempts of the Alabama legislature to propose a so-called "Federal plan" under which the House of Representatives would be based on population and the Senate would be composed of one Senator from each of the 67 counties of Alabama, without regard to population. In striking down the attempt to reapportion the Senate on a Federal plan basis, the Alabama court said:

> "That portion of the proposed constitutional amendment providing a senator for each of the 67 counties of the State if approved by the voters would serve to make the discrimination in the Senate even more invidious than at present. Under the proposed amendment, senators elected by 20% of the State population could effectively block any proposed legislation, and senators elected by 14% of the population could prevent the submission of any future proposal to amend the Constitution of the State of Alabama. The present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the State. The 34 smallest counties, whose total population is less than that of Jefferson County,

would have a majority of the total membership of the Senate. The only conceivable rationalization of this provision is that it is based on political units of the State and is analogous to the requirement of the Constitution of the United States that the Senate 'shall be composed of two Senators from each State.' Article I, Section 3, Clause 1, superseded by Amendment 17. The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties. It has been held repeatedly in Alabama that a county derives its power from the State; that a county is but a governmental agency, possessing no power and subject to no duty not originating from the law by which it is created and in which its functions are defined. The Alabama courts have said that a county is nothing more than an involuntary political or civil division of the State, created by statute to aid in the administration of government; that whatever power the county possesses, or whatever duty it is required to perform, originates solely in the statutes creating it, or in the statutes declaring its power and duty. *Askew* v. *Hale County*, 54 Ala. 639; *State* v. *Butler*, 225 Ala. 191, 142 So. 531; *Tuscaloosa County* v. *Alabama Great Southern R.R. Co.*, 227 Ala. 428, 150 So. 328; *Montgomery* v. *State*, 228 Ala. 296, 153 So. 394; *Moore* v. *Walker County*, 236 Ala. 688, 185 So. 175."

[fol. 176] As a reading of the above quoted language shows, the Federal Court in Alabama repudiated the analogy on which Judge Duckett attempted to rely to support his finding that a Federal plan (which we do not have) would provide a rational basis for representation in the Maryland General Assembly. The Alabama court went on to adopt a temporary plan of reapportionment of the Alabama legislature which took population into account in both the House of Representatives and the Alabama Senate. In doing that, it observed:

"In the present case that doubtful question is further complicated by the detailed requirements of the Alabama Constitution which, as has been said, make it impossible for the representation in *either* House to be based strictly and entirely upon population. The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the '67-Senator Amendment.' The provision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. Compare *Brewer* v. *Gray*, Fla. 1956, 86 So. 2d 799."

In imposing temporary reapportionment, while giving the next session of the Alabama legislature a chance "to provide for a true reapportionment of both houses of the Alabama Legislature," the Court expressed the hope that "the moderate steps taken" under its order might be enough "to break the stranglehold" of gross malapportionment. The Court did not regard what it had done, however, as a substitute for "any permanent reapportionment." The Governor of Alabama has announced that no appeal of the adverse decision would be taken. *The New York Times*, July 24, 1962, p. 15.

In Maryland, 14% of the population can elect a majority of the State Senate. The Alabama plan, which the Federal court rejected, would have permitted 19.4% of the people of that State to control its State Senate. Under the plan

proposed by the Alabama legislature, at least the lower [fol. 177] House would have been based on population, which is still not the situation existing with respect to the Maryland House of Delegates.

If the Alabama decision is correctly decided, and we believe that it is, the argument is inescapable that the decision entered in the instant case below, which apparently has been affirmed by this Court's order of July 23, 1962, is in error.

B. *Florida.* On July 23, 1962, the same day on which this Court entered a *per curiam* decree sustaining the Chancellor's ruling that population need not be taken into account in determining the constitutionality of the representation provided in the Maryland State Senate, the United States District Court for the Southern District of Florida decided to the contrary, so far as Florida is concerned, *Sobel* v. *Adams* (C.A. No. 182-62—M), —— F. Supp. —— (S.D. Fla., July 23, 1962). A copy of the Florida court's opinion is attached to this motion for reargument as Annex 2.

In Florida, 12.3% of the population is sufficient to elect a majority of the State Senate. This is one of the very few instances of malapportionment more invidious than that prevailing in the Maryland State Senate, where it takes almost 15% of the population to control the State Senate. In finding that the existing provision of the constitution and statutes of Florida regarding representation violate the Fourteenth Amendment of the Federal Constitution, the Federal Court said:

> "Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity

between the more populous and the less populous areas.

"The defendants have set forth for us the history of legislative apportionment in Florida. They have outlined for us the efforts made to procure apportionment on a less discriminatory basis. These efforts, particularly in recent years, have met with little success [fol. 178] and such changes as have been made fall far short of affording any substantial correction of the inequality of representation. Indeed, it would seem that, because of population increases and shifts, the disproportion increased rather than lessened. Without discrediting the efforts of those who have sought to mitigate the conditions existing from time to time, those efforts did not produce any substantial alleviation of the preexisting invidious discriminations in apportionment, nor do they now afford any rational basis for a reapportionment that will meet the requirement of equal protection of the law. They do not constitute a defense to the claims for relief here asserted."

C. *Kansas.* On July 27, 1962, the Shawnee County District Court of the State of Kansas ruled that the present representation in the Kansas legislature, in the Senate and in the lower House thereof, violated both the Federal and State constitutions. *Washington Post & Times Herald,* July 28, 1962, p. A-2.

Disparities in the population of the senatorial districts of Kansas range from 17,000 in the smallest county district to more than 300,000 in the senatorial district embracing Wichita, yet the largest district has no more voice in the Kansas State Senate than the smallest district. Moreover, it appears that in Kansas, 28.8% of the population is required to elect a majority of the Kansas Senate. *Compendium on Legislative Reapportionment* (Nat'l. Munic. League: 1962 Ed.). Appellants have not yet received a copy of the Kansas decision and must rely at this point exclusively on the newspaper report referred to herein. Again, however, it would appear that the composition of a State Senate substantially more representative than that

of Maryland, has been declared to be in violation of the Fourteenth Amendment.

D. *Miscellaneous Cases.* It also appears that as a result of a suit brought in Federal Court in Delaware, the legislature and people of that State may take action to reapportion. *Baltimore Morning Sun*, July 28, 1962, p. 5. The Governor of Delaware convened the legislature, and asked it to adopt a reapportionment plan which would base representation in the lower house in Delaware exclusively on population, while the State Senate would be composed of [fol. 179] seven Senators from each of the State's three counties.[1] This, of course, would still discriminate against New Castle County, the urban center of the State, at least so far as the State Senate is concerned. It is reminiscent of the situation which so long existed in Maryland, with Baltimore as the only urban area in the entire State. Appellants should like to point out, however, that no court decision has been forthcoming either with respect to the constitutionality of existing representation in the Delaware legislature, or with regard to that proposed in Governor Carvel's plan of reapportionment.

We are advised that the Deputy Attorney General has furnished the Court a copy of the opinion of the Court of Common Pleas of Dauphin County, Pennsylvania, a decision which he referred to during the course of his oral argument, *Butcher, et al.* v. *Trimarchi, et al.* (No. 2531 Equity Docket). An examination of that opinion shows clearly that no final decision has been entered in that case concerning the grave reapportionment issues presented therein. The Dauphin County Court noted that:

> "The legislature is now informed, as it has not been heretofore, that constitutional apportionment is a matter that can be adjudicated if the legislature fails to do so."

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[1] The plan, in the form of a proposed constitutional amendment, has been approved by one of two required sessions of the Delaware legislature. *Washington Evening Star*, July 31, 1962, p. A-2.

Since the matter was before the Court exclusively on plaintiff's motion for judgment of the pleadings, the failure to grant judgment cannot be taken as holding in favor of the defendant's contentions that the Pennsylvania legislature is constitutionally apportioned. Indeed, the opinion seems to imply that the opposite would be the result, when and if the Court is finally called upon to determine the constitutional questions.

On July 20, 1962, three days before the argument in this case, the full bench of the Vermont Supreme Court ruled [fol. 180] that the existing apportionment of the Vermont Senate was unconstitutional. *Mikell* v. *Rousseau, et al.* (Chancery No. 385), —— Vt. ——, —— N.E. 2d ——, as reported in *The New York Times*, July 21, 1962, p. 21. In Vermont, the maximum dilution in representation as among Senatorial districts is a little over 6 to 1, the same as the maximum discrepancy now prevailing in the Maryland House of Delegates. In Vermont, 47% of the population is required to elect a majority of the State Senate.

Another recent case, but not involving any challenge to the State Senate arose in Rhode Island, where the Supreme Court of that State ruled that the State's General Assembly had an obligation to reapportion the Rhode Island House of Representatives on the strict basis of the 1960 census. According to newspaper reports, the decision "was regarded in some quarters as making virtually certain a special session of the General Assembly of Rhode Island to deal with the problem." *The New York Times*, July 25, 1962, p. 21.

The recent cases very strongly suggest that if Judge Duckett's ruling is allowed to stand, Maryland will be alone and out of step with all the other States which have had occasion to pass on the question of whether a State Senate must be apportioned on a basis which takes population into some account. As of this date, those States are Alabama, Florida, Kansas, Michigan, Oklahoma, Tennessee and Vermont, with the Georgia decision, previously noted by the appellants in their reply brief, also indicating that the

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[1] The Idaho decision, *Caesar* v. *Williams*, —— Idaho ——, 371 P. 2d 241, involved only the lower house and did not reach a final decision on the merits of the Federal issues.

answer will be the same in that State when the precise issue is finally meet for determination.

[fol. 181]

II

Scholle v. *Hare*, A Weaker Case, Is Not Distinguishable

The recent opinion of the Michigan Supreme Court in *Scholle* v. *Hare*, —— Mich. ——, —— N.W. 2d ——, filed July 18, 1962, which struck down the present representation provided in the Michigan State Senate was brought to the attention of the Court during the course of argument on July 23, 1962.[3] Therefore, we will not restate the substantial reasons why appellants believe that, if the case for reapportionment of the Michigan State Senate is sound, the case for reapportioning of the Maryland State Senate is that much more persuasive. The Court is aware of appellants' reasons for such a contention; in Michigan the maximum dilution in the representation ratio of senatorial districts is 15 to 1; in Maryland it is 33 to 1; in Michigan the lower House is based on population; that is still not the case with respect to the Maryland House of Delegates; in Michigan it takes over 30% of the population to elect a majority of the State Senate; in Maryland 14% of the eligible voters can exercise control of the Maryland State Senate; in Michigan the initiative exists as a remedy for relief against gross malapportionment; the initiative is not made available in the Maryland Constitution; in Michigan, at least, the people of the State had an opportunity to vote upon the issue as to whether or not the present composition of the Michigan State Senate was satisfactory to them; in Maryland there has been no such opportunity afforded since the year 1867.

Appellants now challenge the accuracy of statements made by both the Attorney General and the Deputy Attor-

[3] On July 27, 1962, Justice Potter Stewart of the United States Supreme Court stayed the order of the Michigan Supreme Court pending review of that order by the United States Supreme Court. Justice Stewart emphasized that he was not ruling on the merits of the Michigan Supreme Court's decision, but merely delaying it, on the assumption that four justices of the Supreme Court might consider it proper to review the decision. *Baltimore Morning Sun*, July 28, 1962, p. 5; *Washington Evening Star*, July 28, 1962, p. A-5.

ney General before this Court in attempting to distinguish the *Scholle* case. The Attorney after admitting that he [fol. 182] had not read the recent *Scholle* opinion carefully, proceeded to describe the situation presented in that case as one involving "a deliberate political gerrymander" in contrast to the malapportionment in Maryland, which he apparently prefers to believe has been merely the result of recent population migrations. The Attorney General's above stated characterization of the Michigan situation is not correct. The 1952 amendment to the Michigan constitution which created the senatorial districts challenged in that case, did no more than add 2 districts, making 34 in all, to the previously existing 32 senatorial districts. None of the existing 32 districts were changed in any way, and the 2 new districts were to the advantage, not the disadvantage, of the urban areas. The Michigan senatorial districts were created by the Michigan constitution of 1908, Article V, Sections 2, 3 and 4. Prior to 1952, the Michigan senatorial districts were required to be based on population. The last reapportionment of the Michigan senatorial districts was accomplished in 1925 "in rough reliance upon the 1920 Federal decennial census." *Scholle* v. *Hare*, 360 Mich., 1, 8. The objectionable feature of the 1952 amendment was the elimination of "the decennial reapportionment on a population basis previously required," which thereby perpetually froze the existing senatorial districts of Michigan, much as the existing State representation in Maryland has been frozen since 1867, with the subsequent exceptions afforded in the case of Baltimore. *Ibid.*

Scholle v. *Hare*, therefore, involved no more "deliberate political gerrymander" than presented in the instant case. Actually, both cases involve the so-called "silent gerrymander," which, through the deliberate inaction on the part of legislatures controlled by the less populous subdivisions, permits gross malapportionment to increase each year to the continuing and increasing disadvantage of the more populous areas of a State. If the decision of the Michigan Supreme Court was correct on the constitutional issues presented, and we believe that it was, *a fortiori*, Judge Duckett's opinion below must be held to be erroneous [fol. 183] in deciding that population can be disregarded in

considering whether or not representation in the Maryland State Senate complies with the requirements of the Fourteenth Amendment.

III

Proposed Constitutional Amendments

The Court may be aware that an amendment has been proposed to the Constitution of the United States which would give the States certain authority to apportion representation in their legislatures. *The New York Times*, July 24, 1962, p. 15. On July 23, 1962, Representative Johansen of Michigan introduced a joint resolution in the House of Representatives, proposing an amendment to the Constitution which would guarantee any State the right to establish representation in *one* house of its legislature based on factors other than population *exclusively*. H. J. Res. 829, 87th Cong., 2d Sess., July 23, 1962.

Even under the proposed constitutional amendment, the State's authority to base representation on factors other than population *exclusively* would exist only with respect to one house of its legislature. As its sponsor admitted, the proposed amendment is aimed at overturning the decision in *Scholle*. Cong. Rec., Vol. 108, No. 125, July 23, 1962, p. 13461. A similar amendment also was recently proposed by the Southern Regional Council of the Council of State Governors. *Washington Evening Star*, July 28, 1962, p. A-5. This amendment, too, would vest authority in the States to disregard population *only* in *one* House.

Even if either one or the other of the proposed amendments were to become part of our Federal Constitution, Maryland would still be delinquent, in that representation in its House of Delegates is not based on population exclusively. Moreover, the mere fact that such amendments have been proposed, indicates that so far as the requirements of the equal protection of the laws clause of the Fourteenth Amendment now reach, population cannot be completely disregarded in one house of a State legislature, contrary to the ruling below, which this Court sustained by a vote of 4 to 3 in its order of July 23, 1962.

[fol. 184]

Conclusion and Relief Requested

In attempting to distinguish, or to justify, taking population into account in the case of the Senate representation afforded Baltimore, but no other urban areas, the Attorney General relies on an irrefutable proposition—Baltimore is Baltimore! To this contention, in an attempt to differentiate Maryland's obligation to observe the requirements of equal protection of the laws, as opposed to that imposed on the other States of the Union, he has added another irrebuttable argument—Maryland is Maryland! Both propositions are unassailable, but neither is relevant. Nor can either successfully meet the argument that equal protection of the laws prohibits a State from disregarding population completely, or from applying population on a discriminatory or irrational basis as among urban areas, in the upper House of its legislature. The Fourteenth Amendment cannot require one thing in Alabama, Florida, Kansas, Michigan, Oklahoma and Tennessee, and less than that in Maryland.

Accordingly, for the reasons stated above, and in view of the importance of the issues presented, and the close division of the Court on the *per curiam* order of July 23, 1962, we respectfully request that this case be set for reargument. The Court may wish to limit argument to the question or questions of whether or not recent decisions of the State and Federal courts occurring since July 23, 1962, justify a reversal or modification of the Court's order of that date. Appellants realize that the Court is now in recess and the summer vacation has intervened. Still, if the Court is disposed to allow reargument, there is no reason why it could not set the case for hearing in the fall, prior to taking up the cases on the docket for the September 1962 Term. This would give the parties time to file supplemental briefs if the Court thought that this would be helpful. Since it is clear that the appellants could not hope to obtain any preliminary relief from the Supreme Court of the United States prior to the November 1962 elections, they would not be prejudiced by any delay that might ensue should this case be set for reargument.

For the greater reason, no prejudice would be visited upon [fol. 185] the appellees by such delay. Therefore, appellants urge that the Court grant reargument.

Respectfully submitted,

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland;

John B. Wright, 12 Church Circle, Annapolis, Maryland;

Johnson Bowie, County Office Building, Towson, Maryland, Attorneys for the Appellants.

Of Counsel: Shea & Gardner, 734 15th St., N.W., Washington 5, D. C.

Filed: August 1, 1962

Certificate of Service (omitted in printing).

[fol. 186]

ANNEX 1 TO MOTION

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF ALABAMA, NORTHERN DIVISION

Civil Action No. 1744-N

Filed—July 21, 1962

R. C. Dobson, Clerk

By .....
Deputy Clerk

M. O. SIMS, FRED A. BEAM, WYLIE JOHNSON, G. R. SOUTHARD, MILES S. LEE, PAUL FRIEDMAN, WILLIAM LINDSAY WILLIAMS, WILLIAM P. SHAW, JR., PRENTICE W. THOMAS, RICHARD D. TANNEHILL, PAUL M. BYRNE, DAVID R. BAKER, CHARLES MORGAN, JR., and GEORGE PEACH TAYLOR, for themselves jointly and severally, and for all others similarly situated, Plaintiffs,

R. E. FARR, MARSHALL MEADOWS, JACK HOPPING, JACK RYAN, MAX W. MORGAN, DAVID J. VANN, ROBERT S. VANCE, RICHARD P. HUMPHREY, JR., JOHN W. MCCONNELL, JR., JOSEPH N. LANGAN, WILLIAM M. WILLIAMS, JR., and GARET VAN ANTWERP, Intervening Plaintiffs,

vs.

BETTYE FRINK, Secretary of State of the State of Alabama; HARRELL HAMMONDS, Judge of Probate of Lowndes County, Alabama; JOHN A. SANKEY, Judge of Probate of Montgomery County, Alabama; J. PAUL MEEKS, Judge of Probate of Jefferson County, Alabama; JOHN GRENIER, Chairman of the Alabama State Republican Executive Committee; PERRY O. HOOPER, Secretary of the Alabama State Republican Executive Committee; ROY MAYHALL, Chairman of the Alabama State Democratic Executive Committee; H. G. RAINS, Secretary of the Alabama State Democratic Executive Committee; MACDONALD GALLION, Attorney General of the State of Alabama, Defendants.

Rives, Circuit Judge, and Thomas and Johnson, District Judges.

Plaintiffs and the plaintiff-intervenors, as citizens of the United States and of the State of Alabama, and as taxpayers and duly qualified and registered voters in said State and in the Counties of Jefferson and Mobile, jointly and severally bring this action in their own behalf and in [fol. 187] behalf of all other voters in the State of Alabama who are similarly situated. The defendant Bettye Frink is sued in her capacity as Secretary of State for the State of Alabama and as a State constitutional official, who is charged with certain duties and responsibilities concerning the election of members of the Alabama Legislature. The defendants Hammonds, Sankey and Meeks are the duly elected, qualified and acting probate judges of Lowndes, Montgomery and Jefferson Counties, respectively. They are sued in their official capacity as constitutional officers for the State of Alabama and as representatives of all the probate judges of Alabama, who are charged by law with performing and exercising certain duties and powers in connection with the nomination and election of members of the Alabama Legislature. The defendants Grenier and Mayhall are the duly elected, qualified and acting Chairmen of the Alabama State Republican Executive Committee and of the Alabama State Democratic Executive Committee, respectively. They are made defendants in their official capacity as Chairmen of the Executive Committees of said political parties, who are charged by law in the State of Alabama with performing certain duties and functions in connection with the selection, nomination and election of members of the Alabama Legislature. The defendants Hooper and Rains are the duly elected, qualified and acting Secretaries of the Alabama State Republican Executive Committee and the Alabama State Democratic Executive Committee, respectively. Each is sued in his official capacity as an officer of the political party as indicated and is charged by the law of Alabama with performing certain functions and duties in connection with the selection, nomination and election of the Alabama legislators. The defendant MacDonald Gallion is the duly

elected, qualified and acting Attorney General of the State of Alabama, who is charged by the law of the State of Alabama with performing certain duties and functions in connection with the nomination and election of members of the Alabama Legislature.

The plaintiffs[1] bring this action in their own behalf and in behalf of all registered and qualified voters similarly situated, for a declaration of their rights concerning the apportionment of representatives and senators among the counties of the State of Alabama and for such relief [fol. 188] as may be proper to assure them, and all other voters of the State of Alabama that are similarly situated, free and equal suffrage and equal protection of the laws which plaintiffs claim have been for many years denied them by the defendants and their predecessors in office. The plaintiffs say that this Court has jurisdiction of this cause and that they have a right to institute this cause under 17 Stat. at Large 13 and 16 Stat. at Large 144; 42 U. S. C. §§ 1983 and 1988, as follows:

> "§ *1983. Civil action for deprivation of rights* Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."
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> • • • • • • •
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> "§ *1988. Proceedings in vindication of civil rights* The jurisdiction in civil and criminal matters conferred on the districts courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, . . ."

[1] The term "plaintiffs" will be used throughout this opinion to include the original plaintiffs and all intervening plaintiffs.

The plaintiffs, as citizens of the United States and of the State of Alabama, base their claim that they are denied the equal protection of the law accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes, since the Legislature of the State of Alabama has failed and continues to fail to reapportion itself since 1900. Plaintiffs say that the failure of the Alabama Legislature to reapportion itself violates §§ 198, 199 and 200 of the Alabama Constitution of 1901.[2]

In our order of March 30, 1962, setting for hearing the application for interlocutory injunction we indicated our tentative but unanimous opinion that no injunction was required prior to the primary elections, then set for May, 1962, in order for citizens of the State represented by the plaintiffs in this case to be accorded any constitutional rights asserted in time for the exercise of such rights at the general election in November, 1962. In that order [fol. 189] we expressed the further view that there was time for the Legislature of Alabama to comply with its duty prescribed by the Constitution of 1901 of the State of Alabama, and that no action on the part of this Court which was not absolutely essential for the protection of any constitutional rights asserted in the complaint should be taken before the Legislature of Alabama had had a further reasonable but prompt opportunity to comply with its duty. The application for interlocutory injunction was assigned for hearing for April 14, 1962.

On that date we reiterated the same views in continuing the application for interlocutory injunction and resetting it for hearing on July 16, 1962. In that order, for the guidance of counsel and for such aid as we might be, we made certain additional remarks to which we now adhere, as follows:

> "We remain of the same opinion that was expressed in the order setting the application for hearing, viz.: until the Legislature has had a further reasonable but prompt opportunity to comply with its duty under

[2] See Appendix "A."

Sections 199 and 200 of the Constitution of Alabama, this Court should take no action not absolutely essential for the protection of the constitutional rights asserted in the complaint; and no ruling before the primary elections of May 1962 appears essential.

"The application for interlocutory injunction pertains to the conduct of both the primary elections of May 1962 and the general election of November 1962. That application is therefore continued and reset for hearing at 10 o'clock a. m. on Monday, July 16, 1962. The hearing cannot be set for a much later date because, if this Court is to act effectively, some action must be taken in ample time before the general election of November 1962.

"For the guidance of counsel and for such aid as we may be in solving the troublesome but important subject of this litigation, we make the following additional remarks:

"(1) Under the opinion of the Supreme Court of the United States in *Baker* v. *Carr*, No. 6, October Term, 1961, decided March 26, 1962, it seems clear to us that: (a) this Court has jurisdiction of the present action; (b) the complaint as amended states a justiciable cause of action; (c) the plaintiffs have standing to challenge the Alabama apportionment statutes.

"(2) We have no disposition to discourage the introduction of evidence by any party, and in the ordinary case our opinion as to whether the plaintiffs will be entitled to appropriate relief should await the in- [fol. 190] troduction of evidence. However, we take judicial notice of the same facts which are well known to the Justices of the Supreme Court of Alabama and to the people of this State, as expressed on two different occasions in opinions of the Justices.

"'We judicially know that the population of the various counties of this state has changed during the years which have intervened since the Constitution of 1901 was adopted, so that the representation

as provided in §§ 1 and 2 of Title 32, Code 1940, cannot be said to be on a population basis.'

Opinion of the Justices of the Supreme Court of Alabama, No. 117, August 14, 1950, 47 So. 2d 714, 717.

"'We know, and the people of this State know, that our Constitution says that it *shall* be the duty of the legislature to reapportion the legislature according to population after each decennial census and that this constitutional mandate of the Constitution of 1901 has never been complied with.'

Opinion of the Justices of the Supreme Court of Alabama, No. 148, July 11, 1955, 81 So. 2d 881, 887.

"(3) The controlling constitutional formula which runs throughout the Constitution of Alabama is thus expressed in the last sentence of Section 284 of said Constitution: 'Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments.' See also Sections 198 to 201, inclusive. If that formula is met, then there can be no valid objection under the equal protection clause or any other part of the Constitution of the United States, which is, of course, the supreme law of the Land, binding alike on this Court and on the Legislature of Alabama (Article VI, Clauses 2 and 3 of the Constitution of the United States). It is necessary that any action taken by the Legislature comply with constitutional standards, and it is important that such standards be met not halfheartedly but fully, because once there has been a legislative reapportionment, unless it so completely fails to meet constitutional standards that it must be set aside by court order, it will not be subject to alteration until the next session of the Legislature after the decennial census in 1970 (Constitution of Alabama, Section 198).

"(4) In the event that the Legislature of Alabama complies with its duty before the next hearing, and this Court can so find, then no further action will

be needed in this case and the case can be dismissed. If the Legislature does not act, or if its action does not meet constitutional standards, then we will be under a clear duty to take some action in time to take effect before the general election of November 1962. Such action, however, should be held to the minimum that is necessary for the citizens of Alabama to be accorded their constitutional rights.

"(5) To that end, it is fair to advise the parties of our present thinking that we would then follow the plan suggested in the concurring opinion of Mr. Justice [fol. 191] Clark in *Baker* v. *Carr, supra*:

> "'One plan might be to start with the existing assembly districts, consolidate some of them, and award the seats thus released to those counties suffering the most egregious discrimination. Other possibilities are present and might be more effective. But the plan here suggested would at least release the strangle hold now on the Assembly and permit it to redistrict itself.'

"(6) While retaining jurisdiction, we could then defer further decision or action to afford the newly elected Legislature full opportunity to heed the constitutional mandate to reapportion. When that has been done the duty resting on us will be at an end and the case can be dismissed."

On July 12, 1962, an Extraordinary Session of the Legislature of Alabama passed a proposed constitutional amendment, commonly referred to as the "67-Senator Amendment," [3] this proposed constitutional amendment being subject to the ratification of the voters of the State of Alabama in an election to be held in November, 1962. On the same date, the Governor of the State of Alabama signed into law the "Crawford-Webb Bill," [4] as passed by the Alabama

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[3] Officially known as Senate Bill 29 and attached hereto as Appendix "B."

[4] Officially known as House Bill 59 and attached hereto as Appendix "C."

Legislature, which has been referred to as a "standby" legislative act to take effect in the event the voters of the State of Alabama refuse to ratify the proposed "67-Senator Amendment," or this Court refuses to accept said "67-Senator Amendment" as effective action that complies with federal constitutional requirements as laid down in *Baker* v. *Carr*, 369 U. S. 186. The final submission on the motion for interlocutory injunction was on July 16, 1962. This submission was upon the pleadings—a part of which were verified, the affidavits and exhibits thereto, the oral testimony and certain exhibits thereto, and the briefs and arguments of the parties.

It has been generally conceded throughout this litigation by all the parties that the present apportionment of both Houses of the Legislature of the State of Alabama constitutes "invidicus discrimination" in violation of the Equal Protection Clause of the Fourteenth Amendment. The invidiousness of the situation is demonstrated by Appendix "D" to this opinion, this appendix listing each of the 67 counties in the State of Alabama, the population of each [fol. 192] county in 1901 when the Legislature was last reapportioned, the present population of each county, and the representatives authorized from each county to the Alabama House of Representatives; and by Appendix "E" listing the 35 senatorial districts, the population of each district in 1900 and the population of each district in 1960 —each senatorial district in Alabama being authorized one representative to the Senate.

Upon this submission, it becomes our duty: (1) to determine whether those Acts comply with constitutional standards and (2) in the event we are forced, however reluctantly, to find that they do not comply with the guaranty of the equal protection of the laws, then to decide what remedies are available to and should be utilized by this Court.

In proceeding to the performance of that duty we would make a few preliminary comments. It is not our function or desire to criticize the present or preceding legislatures for any failure to heed the clear mandate both of the Constitution of the United States and of the Constitution of Alabama. Nor would we criticize the Alabama courts for re-

fusing to afford relief prior to *Scholle* v. *Hare*, 1962, 369 U. S. 429 (see *Waid* v. *Pool*, 225 Ala. 441, 51 So. 2d 869), or even since that decision (see *Ex parte Rice*, —— Ala. ——, May, 1962). However, in the light of the constitutional principles announced in *Baker* v. *Carr*, *supra*, such failures on the parts of the legislative and judicial departments of the State have left the plaintiffs no alternative but to ask the federal courts to protect the constitutional rights of the citizens of Alabama.

Each of the cases which has arisen since *Baker* v. *Carr*, *supra*, has agreed that the test of compliance with the guaranty of the equal protection of the laws is whether the inequality in voting power is a result of "invidious discrimination." *Sanders* v. *Gray*, 203 F. Supp. 158 (April, 1962); *Toombs* v. *Fortson*, C. A. No. 7883, N. D. Ga., May 25, 1962; *Moss* v. *Burkart*, No. 9130, W. D. Okla., April 30, 1962 and June 19, 1962. In *Sanders* v. *Gray*, *supra*, Judge Bell considered the test rather fully, and arrived at the conclusion that the Supreme Court has now adopted the test urged by Mr. Justice Douglas in his dissenting opinion in *South* v. *Peters*, 1950, 339 U. S. 276, 281, that there shall [fol. 193] be no inequality in voting power by reason of invidious discrimination.[5]

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[5] In the course of that opinion the Justice had commented that, "The creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." 339 U. S. at 279. In like vein, Professor James E. Larson of the Bureau of Public Administration of the University of Alabama begins his recent work on "Reapportionment and the Courts" with such statements as:

"Any citizen, if asked, would in all probability admit to a sense of outrage at the suggestion that his vote be counted for less in the election of legislative representatives than the vote of any other citizen. The principle that a vote cast be counted of equal value to any other is so fundamental to our understanding of democracy as to pass unchallenged. Yet, in practice, the system of legislative representation in one American state after another shows a tenacious disregard for this rudimentary requirement of political equality."

and

Judge Bell continued to formulate a test for invidiousness on a consideration of all relevant factors such as rationality or irrationality of state policy, whether or not the system is arbitrary, whether or not the system has a historical basis in our political institutions—federal or state, the presence or absence of political remedy, and the delicate relationship between the federal and state governments under the Constitution.

This Court has reached the conclusion that neither the "67-Senator Amendment," nor the "Crawford-Webb Act" meets the necessary constitutional requirements. We find that each of the legislative acts, when considered as a whole, is so obviously discriminatory, arbitrary and irrational that it becomes unnecessary to pursue a detailed development of each of the relevant factors of the test.

While it is true that this Court is not here primarily concerned with the constitutionality of any of the proposed action of the Legislature as measured by Alabama constitutional standards and requirements, this Court is here concerned with whether or not the Alabama Legislature, in [fol. 194] taking the action defendants now propose to this Court as "effective legislation," has complied with the constitutional standards required by the Constitution of the United States. In addition, this Court recognizes that there are State constitutional standards to be applied and failure to apply those State constitutional standards by this Court, after it has already taken jurisdiction in this case, will amount to a failure to recognize the principles laid down by the Supreme Court of the United States in *Louis-*

"In a democracy, any action or condition which affects the right to vote is an important matter. It is puzzling, therefore, that unequal representation in the state legislature is not a subject to grip the interest and stir the emotions of the public. Aggrieved citizens no longer rise in force to march on state capitals with the complaint that lack of adequate representation is a cause of sufferings which are 'tedious and beyond the patience of a Job to endure.' Drift of taxing power to Washington, apathy, sophistication, and some cynicism about state government have made such displays out of place and in bad taste. Yet state legislatures today stand as a monumental denial of the principles to which we are committed."

ville & Nashville Railroad Co. v. *Garrett*, 231 U. S. 298, and followed in *Wofford Oil Co.* v. *Smith*, 263 F. 396.

The pertinent portion of § 284 of the Constitution of Alabama is as follows:

> "... Representation in the legislature shall be based upon population, and such basis of representation shall not be changed by constitutional amendments."

This provision in § 284 has never been considered by the courts of the State of Alabama in an adversary proceeding. This Court is informed that during the interval provided by this Court in its order of April 14, 1962, the Legislature refused to inquire of the Supreme Court of the State of Alabama whether this provision in the Constitution of the State of Alabama could be changed by constitutional amendment as the "67-Senator Amendment" proposes. This section of the Constitution of the State of Alabama has been treated, however, by several Justices of the Supreme Court of Alabama in nonadversary proceedings as follows:

(1) *In re Opinion of Justices*, No. 116, 47 So. 2d 713 (1950), where three of the present members of the Alabama Supreme Court, plus one member now deceased,[6] stated:

> "The official proceedings of the Constitutional Convention of 1901 (see Vol. 3, Official Proceedings, Constitutional Convention of 1901, pages 3906-3924) clearly disclose the purpose of the convention to withhold from the legislature the authority to propose amendments to the organic law which would effectively *change the basis of representation in the legislature*. Unquestionably, the above quoted provision of section 284, supra, withholds from the legislature the power and authority to initiate amendments to the Constitution which would have the effect of changing the basis of representation in the legislature to other than a population basis."

[fol. 195] (2) *Opinion of the Justices*, No. 148, 81 So. 2d 881 (1955), where four of the Alabama Supreme Court

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[6] Justices Brown, Livingston, Lawson and Simpson.

Justices, only two of whom are now on the Court,[7] stated:

> "Surely it is self evident that with the ultimate sovereignty residing in the people, they can legally and lawfully remove any provision from the Constitution which they previously put in or ratified, even to the extent of amending or repealing one of the sections comprising our Declaration of Rights, even though it is provided that they 'shall forever remain inviolate.'"

In the same opinion three of the Alabama Supreme Court Justices, all of whom are presently members of that Court,[8] stated:

> "The only way that the people can amend or change the last sentence of Section 284, supra, is through a constitutional convention. It cannot be done by constitutional amendment."

The manifest uncertainty of the legality of the proposed constitutional amendment, as measured by State standards and as demonstrated by the above-quoted opinions of the Justices of the Supreme Court of Alabama, forces this Court to the conclusion that the Legislature may not have complied with the State Constitution in the passage of such an Act.

That portion of the proposed constitutional amendment providing a senator for each of the 67 counties of the State if approved by the voters would serve to make the discrimination in the Senate even more invidious than at present. Under the proposed amendment, senators elected by 20% of the State population could effectively block any proposed legislation, and senators elected by 14% of the population could prevent the submission of any future proposal to amend the Constitution of the State of Alabama. The present control of the Senate by members representing 25.1% of the people of Alabama would be reduced to control by members representing 19.4% of the people of the

[7] Justices Simpson, Stakely, Merrill and Mayfield.

[8] Justices Livingston, Lawson and Goodwyn.

State. The 34 smallest counties, whose total population is less than that of Jefferson County, would have a majority of the total membership of the Senate. The only conceivable rationalization of this provision is that it is based on political units of the State and is analogous to the requirement [fol. 196] of the Constitution of the United States that the Senate "shall be composed of two Senators from each State." Article I, Section 3, Clause 1, superseded by Amendment 17. The analogy cannot survive the most superficial examination into the history of the requirement of the Federal Constitution and the diametrically opposing history of the requirement of the Alabama Constitution that representation shall be based on population. Nor can it survive a comparison of the different political natures of states and counties. It has been held repeatedly in Alabama that a county derives its power from the State; that a county is but a governmental agency, possessing no power and subject to no duty not originating from the law by which it is created and in which its functions are defined. The Alabama courts have said that a county is nothing more than an involuntary political or civil division of the State, created by statute to aid in the administration of government; that whatever power the county possesses, or whatever duty it is required to perform, originates solely in the statutes creating it, or in the statutes declaring its power and duty. *Askew* v. *Hale County*, 54 Ala. 639; *State* v. *Butler*, 225 Ala. 191, 142 So. 531; *Tuscaloosa County* v. *Alabama Great Southern R. R. Co.*, 227 Ala. 428, 150 So. 328; *Montgomery* v. *State*, 228 Ala. 296, 153 So. 394; *Moore* v. *Walker County*, 236 Ala. 688, 185 So. 175.

In a previous order we indicated our view that the controlling or dominant provision of the Alabama Constitution on the subject of representation in the Legislature was the last sentence of § 284 heretofore quoted. To some extent that thought is emphasized separately as to the House by §§ 198 and 199 and as to the Senate by § 200, but at the same time diluted by other and somewhat conflicting requirements. As to the House, it is provided that each county shall be entitled to one representative and that the total shall be not more than 105 plus the number of new counties subsequently created, so that the total membership of the

House is now 106, of which 67 are distributed one to each of the 67 counties, leaving only 39 to be apportioned among the several counties according to the number of inhabitants in each. As to the Senate, it is provided by § 197 that, "The whole number of senators shall be not less than one-fourth or more than one-third of the whole number of representatives." At present the number of senators is the maximum, [fol. 197] 35. Section 200 provides for "as many senatorial districts as there are senators, which districts shall be as nearly equal to each other in the number of inhabitants as may be, and each shall be entitled to one senator, and no more." It further provides that, "No county shall be divided between two districts, and no district shall be made up of two or more counties not contiguous to each other."

If what we have called the controlling or dominant provision that representation shall be based upon population should be met completely in both Houses, then, without doubt, the State would accord to every person the equal protection of the laws in compliance with the Fourteenth Amendment. It is difficult to determine how far that overriding requirement of the Federal Constitution can be met and also comply with each of the more detailed requirements of the Alabama Constitution. Certainly an earnest effort must be made to meet all such requirements, and it is only in the event that proves impossible that the Supremacy Clause of the Federal Constitution would cause any irreconcilable and conflicting requirement of the State Constitution to give way. Such a result must appear necessary beyond a reasonable doubt before any of the requirements of the State Constitution can be ignored. The result is that we must approach the task of finding a remedy for the existing invidious discrimination within the framework of each of the detailed requirements of the Alabama Constitution.

Those requirements make it obvious that in *neither* the House nor the Senate can representation be based strictly and entirely upon population. There must be differences in the values of votes from the several counties in each House of the Legislature. In *Toombs* v. *Fortson*, *supra*, that court concluded that it must apply the "invidious discrimination" test "in determining whether the plaintiffs'

rights under the equal protection clause have been violated by a system of legislative representation in either or both of the chambers of the State Legislature in such manner or to such a degree as to constitute invidious discrimination as to them."

In that case the court further stated that ". . . we do not find any authoritative decision by the Supreme Court that [fol. 198] causes us to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population." It conceded, however, that there was some basis for that argument in the light of *Scholle* v. *Hare, supra,* especially when consideration is given to Mr. Justice Douglas's dissenting opinion in *MacDougall* v. *Green,* 335 U. S. 281, at pages 287, 289. See also *The Maryland Committee for Fair Representation, et al.* v. *Tawes, Governor,* No. 13920 Equity, from the Circuit Court for Anne Arundel County, Md., filed June 28, 1962. In the present case that doubtful question is further complicated by the detailed requirements of the Alabama Constitution which, as has been said, make it impossible for the representation in *either* House to be based strictly and entirely upon population. The result may well be that representation according to population *to some extent* must be required in *both* Houses if invidious discrimination in the legislative systems as a whole is to be avoided. Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the "67-Senator Amendment." The provision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. Compare

Brewar v. *Gray*, Fla. 1936, 86 So. 2d 799. These reasons are in addition to those heretofore given in this opinion.

The proposed reapportionment of the Senate in the "Crawford-Webb Act" is a step in the right direction, but an extremely short step. It does correct a few of the most glaring discriminations by eliminating such single county senatorial districts as Lowndes with a population of 15,417, Wilcox with a population of 18,739, Barbour with a popula-
[fol. 198a] tion of 24,700, and Marengo with a population of 27,098, and puts those small counties into multiple county districts. It makes Etowah, with a population of 96,980, into a single county district. The Act embodies some other improvements on the present system of representation in the Senate. On the other hand, this piece of legislation keeps the control of the Alabama Senate in 27.6% of the people of the State of Alabama. This represents an improvement of only 2.6% over the present control of 25.1%. The vote of a citizen of the Bibb and Perry senatorial districts would be worth twenty times that of a citizen in the Jefferson senatorial district. The vote of a citizen in the 6 smallest senatorial districts would be worth fifteen or more times that of a citizen in the Jefferson senatorial district. In 22 districts, a citizen would have eight or more times as much representation as a citizen residing in the Jefferson district. Other isolated variations are: Lauderdale (population 61,622) is given one-half a senator by being placed with Limestone (population 36,513), making a district of over 98,000 people. This is opposed to Pickens (population 21,882) and Lamar (population 14,271), having one-half a senator each, with a total population of 36,153. To aggravate this, Colbert (population 46,506), Franklin (population 21,988) and Marion (population 21,837), having a total population of over 90,000, are given one-third a senator, while Henry (population 15,286), Hale (population 19,537), Bibb (population 14,357), Perry (population 17,358), Bullock (population 13,462), Lowndes (population 15,417), Marengo (population 27,098) and Sumter (population 20,041), all in the Black Belt area, are each placed in two-county senatorial districts and thereby given one-half a senator. An analysis of the "Crawford-Webb Act" as it proposes to reapportion the Alabama Senate is attached hereto as Appendix "F."

In summary as to the Senate, at best the "Crawford-Webb Act" represents a slight improvement over the present system of representation.

The "Crawford-Webb Act" as it concerns the Alabama House of Representatives is totally unacceptable. The proposed allocation of seats in the House adopts the Alabama constitutional requirement of one per county, with the remaining 39 seats allocated in a manner showing that no [fol. 199] rational reapportionment plan was followed.[9] For instance, each representative from Jefferson County (12 total) and Mobile (6 total) must represent over 52,000 citizens. The Black Belt counties of Bullock, Lowndes, Autauga, Perry, Hale, Greene, Wilcox and Henry, all have representatives speaking for less than 20,000 citizens.

"The Legislature itself must have recognized that the provisions of the "Crawford-Webb Act" for representation in the House were not fair or reasonable when it proposed in the "67-Senator Amendment" a reapportionment of the House of Representatives, based upon reason, with a rational regard for known and accepted standards of apportionment. The "67-Senator Amendment" proposes to apportion the seats in the House of Representatives according to the "Equal Proportions Method." (See footnote 9, *supra.*) It is an endeavor to equalize the representation between counties in the House of Representatives of a fixed size by reducing as much as possible the percentage difference between the representation of each county. This Court accepts and adopts as a part of its order that portion of the proposed "67-Senator Amendment" that relates to the reapportionment of the Alabama House of Representatives. This action will increase the representation of 6 counties as follows: Jefferson from 7 to 17; Mobile from 3 to 8; Calhoun from 2 to 3; Etowah from 2 to 3; Madison from 2 to 3; and Tuscaloosa from 2 to 3. It will decrease the representation of 19 counties as follows: Dallas from 3 to 2; the following each from 2 to 1: Jackson, Chambers, Tallapoosa, Hale, Perry, Sumter, Marengo, Wilcox, Lowndes, Elmore, Butler, Pike, Lee, Russell, Barbour, Henry, Clarke

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[9] See "A Survey of Methods of Reapportionment in Congress," by Edward V. Huntington, Department of Mathematics, Harvard University, Senate Document No. 304, 76th Congress, Third Session.

and Bullock. It will result in apportioning the House seats (106) as follows: Jefferson—17 (population 634,864); Mobile—8 (population 314,301); Montgomery—4 (population 169,210); Calhoun—3 (population 95,878); Etowah—3 (population 96,980); Madison—3 (population 117,348); Tuscaloosa—3 (population 109,047); Dallas, Lauderdale, Morgan, Talladega and Walker—2 each; the remaining counties—1 each.

As a permanent piece of legislation the "Crawford-Webb [fol. 200] Act" would remain in effect not subject to alteration until the next decennial federal census. See §§ 198 and 200 of the Constitution of Alabama of 1901. The Attorney General of Alabama so argues in his brief, as follows: "... if the constitutional amendment is defeated, the statutory bill, if constitutionally sound, will be effective and cannot be changed before the next Federal Census." Because any legislative reapportionment is not subject to change over such a long period, we called attention in our order of April 14, 1962 to the importance of constitutional standards being met "not halfheartedly but fully." As a piece of permanent legislation the provisions of the "Crawford-Webb Act" both as to the Senate and as to the House are totally unacceptable.

Those provisions are unacceptable for the further reason that the effective date of the Act is postponed until the general election to be held in November 1966, so as to await the approval or disapproval by the voters of the "67-Senator Amendment." Such postponement was unnecessary because, as we have already held, the portion of that proposed amendment providing a senator for each of the 67 counties, if approved by the voters, would itself be unconstitutional. No good reason is shown, therefore, why the plaintiffs and others like situated should be thus postponed in the exercise of their rights to the equal protection of the laws, nor why this Court should not now take some steps which may enable the Legislature elected in November 1962 to provide for a fair and proper reapportionment.

The changes resulting from the present order of this Court, unlike those which would result from a permanent Act of the Legislature, will be subject to change by the newly elected Legislature. As indicated in our order of

April 14, such changes should be held to the minimum necessary to release the strangle hold on the Legislature and permit it to reapportion itself.

The duty to reapportion rests on the Legislature. This Court acts in the matter reluctantly because of the long-continued default and total inability of the Legislature to reapportion itself. Even under such circumstances, we think that a federal court, in the light of its delicate relationship with a state legislature, should, so far as is possible, accept such parts of the Acts of the Legislature as [fol. 201] have any merit in framing the order of the Court. For the purpose of the order of the Court to release the strangle hold on the Legislature and permit it to reapportion itself, such parts of the Acts of the Legislature need not meet the standard of constitutionality required of a permanent Act of reapportionment.

We have no hesitancy in accepting as a part of this Court's order the provisions of the proposed "67-Senator Amendment" relating to the House of Representatives. The real difficulty comes as to the Senate. The proposed reapportionment of the Senate in the "Crawford-Webb Act," unacceptable as a piece of permanent legislation, may not even break the strangle hold. The only alternatives, however, which have been suggested or which appear to be subject to approval by the application of mathematical or judicial as distinguished from political standards, would result in very drastic reapportionment, and would probably place 9 counties having over half the population of the State in control of the Senate. Several senators would have to be allotted to Jefferson County and more than one to Mobile County and to Montgomery County. If the provisions of the State Constitution do not permit a single county to be divided into more than one senatorial district, such restriction would have to be held in conflict with the overriding requirement of equal protection of the laws provided by the Federal Constitution. We are not yet convinced of such conflict beyond a reasonable doubt. Despite our doubts as to their sufficiency, we therefore accept, in framing our order, that part of the "Crawford-Webb Act" providing for the reapportionment of the Senate.

It is this Court's intention that the changes relating to the House of Representatives provided in the proposed "67-Senator Amendment" and those relating to the Senate provided in the "Crawford-Webb Act" should go into effect at the general election to be held in the State in November 1962, and with the Legislature as provisionally reapportioned by this Court taking office immediately after said election. It is this Court's further intention to retain jurisdiction of this case and defer any hearing on plaintiffs' motion for a final injunction until the Legislature, as provisionally reapportioned by this order, has an opportunity to provide for a true reapportionment of both Houses of the [fol. 202] Alabama Legislature. The Court hopes that the moderate steps taken by this order may be enough to break the strangle-hold. They certainly will not suffice as any permanent reapportionment. If they should prove insufficient to break the strangle hold, the Court remains under the solemn duty to relieve the plaintiffs and other citizens like situated from further denial of the equal protection of the laws. That much must be accomplished before there can be a final disposition of this case.

In order to effectuate this opinion the Court will issue an appropriate order.

Done this the 21st day of July, 1962.

Richard T. Rives, United States Circuit Judge;
Daniel H. Thomas, United States District Judge;
Frank M. Johnson, Jr., United States District Judge.

[fol. 203]

ANNEX 2 TO MOTION

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 182-62-M-Civil—DD

PETER B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, Defendant.

No. 186-62-M-Civil—DD

RICHARD H. M. SWANN, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, et al., Defendants.

Interlocutory Judgment

This consolidated cause came on to be heard this day upon the pleadings, the stipulations made and the evidence submitted, and argument of counsel being heard, it is

Ordered, Adjudged and Decreed:

1. That this statutory three-judge court has been duly constituted, has jurisdiction of the parties and subject matter of the consolidated cause, and has power to adjudicate the controversy presented and to grant such relief as may be appropriate.

2. The Court concludes and hereby determines that the existing constitutional and statutory provisions relating to the apportionment and reapportionment for the nomination

and election of the Senate and the House of Representatives of the Florida Legislature are invidiously discriminatory [fol. 204] against the plaintiffs and others similarly situated, and deny to them equal protection of the law as guaranteed by the Constitution of the United States. Said provisions are hereby found and declared to be prospectively null, void and inoperative.

3. The consolidated cause is hereby continued until August 13, 1962, at which time the Court will consider the relief to be granted by its final judgment.

Done and Entered this 23rd day of July, 1962.

Warren L. Jones, United States Circuit Judge;
Wm. A. McRae, Jr., United States District Judge;
David W. Dyer, United States District Judge.

[fol. 205]

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF FLORIDA

MIAMI DIVISION

No. 182-62-M-Civil—DD

PETER B. SOBEL, on behalf of himself and all others similarly situated, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, Defendant.

No. 186-62-M-Civil—DD

RICHARD H. M. SWANN, Plaintiff,

vs.

TOM ADAMS, Secretary of State of the State of Florida, et al., Defendants.

Before Jones, Circuit Judge, and McRae and Dyer, District Judges.

Jones, Circuit Judge:

In these cases, here consolidated, like questions are presented and the same relief is sought. They come before us on final hearing. By the facts stipulated and those of which we take judicial notice it clearly appears, and the Court finds, that the existing provisions of the Constitution and statutes of the State of Florida which relate to the apportionment for the nomination and election of the members of the Senate and House of Representatives of the Legislature of Florida are invidiously discriminatory against the plaintiffs in the within causes and against others similarly situated. Such provisions are in deprivation of the rights of the plaintiffs and their class guaranteed by the Constitution of the United States. Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed. 2d 663.

[fol. 206] Each of the three representatives in the Florida House of Representatives from Dade County, the most populous county in the State, represents the equivalent of 311,000 people according to the 1960 Federal census. The member from Gilchrist, the least populous county, would represent 2,868 residents. The five most populous counties average one representative for each 106,000 people. The five least populous counties average one representative for each 3,266 people. The membership of the Florida Senate, considered on a basis of representation of numbers, would show a similar disparity between the more populous and the less populous areas.

The defendants have set forth for us the history of legislative apportionment in Florida. They have outlined for us the efforts made to procure apportionment on a less discriminatory basis. These efforts, particularly in recent years, have met with little success and such changes as have been made fall far short of affording any substantial correction of the inequality of representation. Indeed, it would seem that, because of population increases and shifts, the disproportion increased rather than lessened. Without discrediting the efforts of those who have sought to mitigate the conditions existing from time to time, those efforts did not produce any substantial alleviation of the preexisting invidious discriminations in apportionment, nor do they

now afford any rational basis for a reapportionment that will meet the requirement of equal protection of the law. They do not constitute a defense to the claims for relief here asserted.

We do not now decide whether or not this Court has the power to enjoin the submission to the voters of Florida of the now pending amendment to the Constitution of Florida [fol. 207] which, if adopted, would reapportion the Florida Legislature. We do not relinquish that power if it exists. We think that it is appropriate to do no more at this time than to say that it is the present opinion of the Court that the reapportionment, which the amendment would make, does not meet the Federal Constitutional requirement of equal protection.

The defendants point to *Shiver* v. *Gray, Secretary of State*, 5th Cir. 1960, 276 F. 2d 568, as a case squarely in point and a precedent which should control our decision. It need only be noted that this opinion was rendered prior to and is in conflict with *Baker* v. *Carr*, supra, and is not to be followed.

We find that the Court has jurisdiction of the parties and of the subject matter of the causes; that justiciable matters are presented for decision, and that the plaintiffs have standing to bring and maintain these suits.

We conclude that the constitutional and statutory provisions of the State of Florida, which provide for the apportionment and reapportionment, are null, void and prospectively inoperative.

The plaintiffs and the class represented by them are entitled to such relief as will afford them equal protection of the laws. Before the entry of a final judgment or decree the Court should have the benefit of further evidence and argument on the manner in which the relief should be awarded. The more desirable means of accomplishing the necessary reapportionment is through state action. The duty to place the state in compliance with the requirement of the United States Constitution rests primarily and rests heavily upon the state itself. Should the state fail or neglect to perform this obligation with that dispatch which the urgency of the matter requires, then the less desirable [fol. 208] reapportionment by judicial decree would be re-

quired. It seems that there is ample time for a valid reapportionment to be made and become effective prior to the time for the convening of the regular legislative session in 1963.

In order to permit the State of Florida and its officials to undertake a compliance with the requirements of the United States Constitution, it seems appropriate that the entry of a decree be deferred for a reasonable period of time. If, at the end of that period, the Florida Legislature has been convened in special session for effectuating, by legislation or by amendment to the Florida Constitution, or both; or if at that time some other state action has been undertaken, an application for a further continuance would be looked upon with favor. Otherwise the Court will then proceed to fashion a remedy of reapportionment by judicial decree in such manner as may seem to the Court best adapted to meet the requirements of equal protection.

Dated at Miami, Florida, this 23rd day of July, 1962.

Warren L. Jones, United States Circuit Judge.
Wm. A. McRae, Jr., United States District Judge.
David W. Dyer, United States District Judge.

[fol. 209]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, Governor, et al.

Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

OPINION BY HENDERSON, J.—September 25, 1962

Brune, C.J., Prescott and Marbury, JJ. dissent.

[fol. 210] On July 23, 1962, we filed a per curiam order affirming a declaratory decree of the Circuit Court for Anne Arundel County that Article III, sec. 2 of the Maryland Constitution is valid and constitutional. We now state the reasons for our order.

This is the third time this case has been before this Court. On April 24, 1962, following the Supreme Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, and its per curiam order in *Scholle* v. *Hare*, 369 U.S. 429, we reversed a decision of the Circuit Court for Anne Arundel County which had sustained the appellees' demurrers to the bill of complaint. We held, by a divided court, that the bill, alleging that the apportionment prescribed by the Maryland Constitution violated the Fourteenth Amendment to the United States Constitution, stated a justiciable cause of action cognizable in the State courts, and remanded the case in order that the chancellor might determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses." *Md. Committee* v. *Tawes*, 228 Md. 412, 436. We also said that "inquiry into the rational basis for such apportionment seems to be called for."

On May 28, 1962, the chancellor, after argument but without hearing testimony, held on motion for summary judgment that the composition of the House of Delegates, prescribed by Article III, sec. 5 of the Maryland Constitu-
[fol. 211] tion, violated the Fourteenth Amendment, in that the distribution of numerical voting strength in voting for members of the House of Delegates, accorded to voters in the four suburban and more populous counties, was arbitrary and unreasonable. He reserved decision as to the Senate.

The Governor promptly convened a special session of the General Assembly, which for the first time in the history of this State added nineteen Delegates to the House of Delegates, to be voted for in the 1962 elections, by "stop-gap" legislation rather than by proposing a constitutional amendment. A proposed constitutional amendment failed

of passage. The appellants entered an appeal from the chancellor's order reserving decision as to the Senate and we remanded the case with directions that the chancellor decide the point. The present appeal is from that decision. No question is presented as to the validity of the "stop-gap" legislation or the reapportionment of the House of Delegates.

Article III, section 1 of the Maryland Constitution provides: "The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates; and shall be styled the General Assembly of Maryland."

Art. III, sec. 2 provides: "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the pro- [fol. 212] visions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election."

Throughout the colonial period the upper house consisted of the Governor and Council, appointed by the proprietor, and modeled after the English House of Lords. They also sat as a provincial court and court of appeals from the county courts. See Bond, Court of Appeals of Maryland, p. 4 et seq. See also 1 McMahon, Historical View of the Government of Maryland (1831), p. 148. That they had a certain sectional distribution was fortuitous. While the House of Delegates was selected on a county basis (four from each) the councilors were selected from among the most eminent landowners and office holders, serving at the will of the Governor.[1] In the Constitution

[1] The last colonial legislature convened on March 23, 1774, and the twelve councilors present were: Benedict Calvert, John Ridout, John Beale Bordley, George Stewart, Daniel of St. Thomas Jenifer, Benjamin Ogle, Philip Thomas Lee, Richard Lee, William Hayward, Daniel Dulany (the Younger), William Fitzhugh and George Plater. Archives of Md. LXIV.

of 1776, Art. XV provided for a Senate to be elected by the vote of Delegates elected two from each county and one each from the City of Annapolis and Baltimore Town. At that time there were eight counties on the eastern shore and ten counties on the western shore. These electors were directed to elect six senators from residents of the [fol. 213] eastern shore and nine senators from residents of the western shore, "men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of one thousand pounds current money." See Niles, Maryland Constitutional Law, p. 5. By the amendment proposed by Chapter 197, Acts of 1836, and ratified in 1837, the Senate was reconstituted to consist of one [fol. 214] senator from each county (of which there were then twenty by reason of the establishment of Allegany and Carroll Counties) and one from Baltimore City. The method of indirect election by an electoral college was abandoned. This distribution was continued in the Constitution of 1851, and so far as the counties are concerned, was continued in the Constitutions of 1864 and 1867, and in subsequent amendments. The last county to be formed, Garrett, was erected in 1872. See 3 Scharf, History of Maryland, p. 778. From that date the counties have numbered twenty-three.

However, Baltimore City, which had achieved the status of a political subdivision independent of Baltimore County in 1851, was allotted three senators, one from each legislative district, in 1864 and this provision was continued in 1867. It received an additional legislative district and senator in 1900 and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County by Chapter 82 of the Acts of 1918.

The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire, associated with the important office of sheriff. 1 Scharf, *supra*, p. 124 et seq. Indeed, Kent County had been established by Claiborne before the landing of

the Marylanders and he established New Kent County in Virginia after he was ousted from Maryland *vi et armis* by the Calverts. We have noted that there were eighteen counties at the time of the adoption of the Constitution of [fol. 215] 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. Baltimore County, the most populous in the State, still has no incorporated towns, and until the recent adoption of a charter form of government, was governed by three elected commissioners who exercised the executive functions, while most of the legislative functions were exercised by its representatives in the General Assembly. Baltimore City, having acquired the unique status of an independent political subdivision, has maintained its own local government, subject to control by the General Assembly, since 1867. Only two counties, Montgomery and Baltimore have adopted the charter form of government under Art. XI of the State Constitution. While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, *Howard County* v. *Matthews*, 146 Md. 553, 561, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

It is an interesting historical fact that the mode of selecting the members of the United States Senate adopted in 1789 was modeled, to a considerable extent, upon the Maryland Senate of 1776. In addressing the Constitutional Convention on August 14, 1787, Madison opposed a proposal that senators be paid by the states on the ground that it would tend to impair the stability and independence of [fol. 216] the Senate, which, he remarked, "was formed on the model of that of Maryland." 4 The Writings of James Madison, edited by Gaillard Hunt, G. B. Putnam's Sons (1903) p. 202. Again, in No. 63 of The Federalist Papers, Madison in answering a contention that a Senate appointed not immediately by the people, and for a term of six years, would acquire a dangerous preeminence in the government

and finally transform it into a tyrannical aristocracy, stated that "the constitution of Maryland furnishes the most apposite example. The senate of that State is elected, as the Federal Senate will be, indirectly by the people; and for a term less by one year only, * * *. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms have appeared. On the contrary * * * the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union". The members of the Federal Senate continued to be elected by the state legislatures until the adoption of the Seventeenth Amendment in 1913. It is also interesting to note that when Maryland abandoned the selection of state senators by an electoral college in 1837, it adopted a provision for one senator from each county and from Baltimore City, following the federal pattern of geographical representation in the upper house.

The question before us is not whether such a provision [fol. 217] is wise or unwise but simply whether, as alleged in the bill, membership in both houses of a bicameral legislature must "be based on, or reasonably related to, the present population" of the various political subdivisions of the State. Since the provision of one senator from each county has been repeatedly approved and incorporated in the Maryland Constitution by the people of Maryland, it cannot conceivably offend the Maryland Constitution. The sole claim is that it violates the equal protection clause of the Fourteenth Amendment.

Equal protection has been judicially equated to a prohibition against invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Not every discrimination is invidious, nor will it be set aside "if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 and cases cited. We think a complete justification for the election of state senators on a county basis is to be found in the historical precedents cited above. The idea of a bicameral legislature, with the upper branch selected on a territorial rather than a popular

basis, was a familiar one in 1837 and it is familiar today. The very purpose of having two houses was that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation. A different method of selection was essential to the bicameral plan. No more natural or logical basis could be suggested than that the viable and long established political subdivisions be accorded representation, as they had been in election of electors under the Constitution of 1776.

[fol. 218] The bicameral concept is not one that has become obsolete with the passage of the years. It has been repeatedly recognized by Congress and the President, subsequent to the adoption of the Fourteenth Amendment, in approving the constitutions of states seeking admission to the Union. See *Coyle* v. *Smith*, 221 U.S. 559. In the most recent cases, Alaska and Hawaii, their Constitutions each contain provisions for senatorial districts of marked inequality in popular representation. In Alaska one of the senators represents more than fifteen times as many voters as the other. Moreover, the constitutions of a majority of the states that ratified the Fourteenth Amendment contained provisions for an upper house based on a geographical distribution of senators, without reference to population. It can hardly be maintained that in voting for ratification they were, in effect, voting to invalidate their own state constitutions.

The appellants argue that the Federal Constitution furnishes neither analogy nor precedent for the composition of the Maryland Senate, on the ground that the states which adopted the Federal Constitution were sovereign bodies. The argument overlooks the fact that thirty-seven states were admitted to the Union after 1789, which were not and had never been sovereign bodies, with the possible exception of Texas. It also overlooks the fact that it was never suggested that senators vote by states. They were clearly members of a national congress, designed for the very purpose of achieving a greater stability and a stronger cen-

[fol. 219] tral government than under the Articles of Confederation. In any event, the consequence and effect upon voting rights are the same, whether the voter be voting for United States senator or state senator. We think it is

hardly conceivable that a different principle would apply in the one case than in the other.

We are of course aware that the government of the United States, within its delegated powers, may possess rights not retained by the states. But where civil rights are concerned there is still truth in the ancient adage that what is sauce for the goose is sauce for the gander. When the Supreme Court held in *Brown* v. *Board of Education*, 347 U.S. 483, that the equal protection clause prohibited the states from maintaining racially segregated schools, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497, decided the same day, that the Federal Government was likewise barred by the Fifth Amendment. The relation between the two amendments seems sufficiently close to negative a conclusion that a provision like that for the Federal Senate, U.S. Const., Art. I, sec. 3, would be offensive to either.

The appellants argue, however, that the federal plan has not been followed in Maryland, since an exception has been made in the case of Baltimore City, which has been subdivided into six election districts and now has six senators. The argument proves too much. The fact that the original plan has been modified in one instance does not require that it be totally abandoned. There are reasons for a distinction. In 1864, when Baltimore City acquired three [fol. 220] senators, the State was in the control of the Union Army and many of the southern sympathizers in southern Maryland and the eastern shore had been disfranchised. There were special reasons for the continuance of extra representation in 1867, in 1900, and again in 1920, when the population of Baltimore comprised fifty-one per cent of the population of the State. Baltimore, even prior to the Civil War, was a great seaport, an industrial center and the hub of commerce and communication. Despite the distrust for city governments, dominated around the turn of the century by "rings" and "bossism", it mustered enough political power to enlarge its representation. Until quite recently it has been underrepresented in the House of Delegates, as well as in the Senate, although the picture has changed with the population explosion in the suburban counties, and it is not far out of line. The instant case is a contest for political power between the larger and the

smaller counties, and Baltimore City is not concerned. It may also be noted that there is no constitutional requirement of territorial uniformity under the Fourteenth Amendment. *Salsburg* v. *Maryland*, 346 U.S. 545; *Ocampo* v. *United States*, 234 U.S. 91.

We find nothing in the Supreme Court cases to support the appellants' claim of invalidity in the apportionment of the Maryland Senate. *Baker* v. *Carr*, *supra*, merely decided that a justiciable question was presented. The remand in *Scholle* v. *Hare*, *supra*, was for the express purpose of allowing the Michigan Court to give further consideration to the question presented in the light of *Baker* v. *Carr*. [fol. 221] We do not read into that remand any intimation as to how the case should be decided on the merits. Nor do we attach any significance to the similar remand in the New York case of *W.M.C.A., Inc.* v. *Simon*, 370 U.S. 190. Upon remand, the Michigan Court, by a vote of four to three, held that in "(t)he absence of any semblance of design or plan in the present senatorial districts," the state constitutional provision approved by the voters in 1952, was invalid. But Mr. Justice Stewart stayed the order for reapportionment, stating: "It is very clear the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker* v. *Carr*." We think it is significant that Mr. Justice Stewart, concurring in the *Baker* case, said: "The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' * * *."

"In *MacDougall* v. *Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' * * *." We find no intimation in later Supreme Court cases that this is not still the law.

[fol. 222] We think there is little to be gained from a review of cases in other states and in the lower federal

courts. A typical statement is that of the Tennessee Court upon remand of *Baker* v. *Carr*, 31 L.W. 2003 (June 22, 1962): "[E]qual protection requires that * * * apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor." See also *Sims* v. *Frink*, 30 L.W. 2512 (Ala.), *Toombs* v. *Fortson*, 30 L.W. 2605 (Ga.) (May 25, 1962) and *Caesar* v. *Williams*, 371 P.2d 241 (Ida.) rehearing denied May 8, 1962. In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all. Such cases are readily distinguishable. In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States.

[fol. 223]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.,

v.

J. MILLARD TAWES, Governor, et al.

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially Assigned), JJ.

DISSENTING OPINION BY BRUNE, C. J., IN WHICH PRESCOTT AND MARBURY, JJ. CONCUR—Filed September 25, 1962

[fol. 224]

Brune, C.J., with whom Prescott and Marbury, JJ., join, dissenting:[1]

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[1] But for the recent (and fortunately temporary) illness of Judge Prescott, who wrote the majority opinion on the first appeal in this case, this opinion would have been written by him.

The question on this appeal is fundamentally one of Federal constitutional law—the meaning and application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States with regard to the apportionment of representation in the legislature of a State. That was also true on the first appeal, but the question as then presented was two-pronged and related to the apportionment of representation (a) in the House of Delegates and (b) in the Senate of the General Assembly of Maryland. As a result of legislation enacted after the first appeal, the present controversy is limited to the apportionment of representation in the State Senate. The trial court determined, following a second remand of the case, that if the House were properly apportioned (as he thought it had been by the Special Session of the General Assembly following the determination just prior to the Special Session that its then existing apportionment would not be sustainable as to the 1962 election), there was no need to reapportion representation in the Senate on any basis of population. He based his conclusion upon an analogy to the Federal system under which the House of Representatives is apportioned on the basis of population, but each of the States, regardless of population, has two members of the Senate. He accordingly dismissed the bill as to re-[fol. 225] apportionment of the Senate. By a per curiam order joined in by four of the seven judges this Court affirmed the order of dismissal. We dissented.

In the majority opinion on the first appeal, *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, we stated some familiar propositions which are equally apposite here: that the Constitution of the United States and laws made in pursuance thereof are parts of the supreme law of the land and are paramount to any contrary provisions of the Constitution or laws of this State, that this is so both under the Supremacy Clause of the Constitution of the United States and under Article 2 of the Maryland Declaration of Rights, the latter in effect writing into our State Constitution this limitation upon everything else therein expressed; and that interpretations of the Constitution of the United States by the Supreme Court of the United States are binding upon us. We be-

lieve that there is no dispute or difference between the members of this Court on those propositions. The last of them was recognized by the majority opinion on the first appeal (228 Md., at 418 and 428) and also by the dissenting opinion (228 Md., at 448). Our difference with the present majority is based upon our understanding of the effect of recent decisions of the Supreme Court bearing upon the subject in hand.

[fol. 226] The first of those cases is, of course, *Baker* v. *Carr*, 369 U. S. 186. It makes clear, we think, that the Equal Protection Clause of the Fourteenth Amendment does afford protection against the debasement or dilution of voting rights through State legislative apportionment of representation. The exact point at which such protection will be afforded in any specific case; it is true, is not determined in *Baker* v. *Carr;* nor, we think, could it well have been. The basis of the claim of the plaintiffs-appellants was discrimination through the debasement or dilution of their voting rights through the apportionment of representation in the Tennessee Legislature (both houses) without regard to population. The second proposition determined by the Supreme Court is thus stated (369 U.S., at 197-98, 82 S. Ct., at 699): "(b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief." And near the end of the opinion of the Court Mr. Justice Brennan further said (369 U.S., at 237, 82 S. Ct. at 720): "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

We think it also clear both from what we have just quoted and from footnote 15 to the opinion of the Court in *Baker* [fol. 227] that the right for which the appellants were entitled to seek protection and which might be found, upon trial of the merits, to have been violated was a Federal constitutional right. Footnote 15 (369 U.S., at 195, 82 S. Ct., at 698) reads in part as follows: "The complaint, in addition to the claims under the Federal Constitution, also alleges rights, and the General Assembly's duties, under the

Tennessee Constitution. Since we hold that appellants have —if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

The majority opinion in the instant case appears to take a different view and to confuse the remedy with the right. In the last paragraph of the majority opinion cases in other States and in the lower Federal courts are dismissed with the comment that "there is little to be gained from a review of [such] cases." The opinion cites several of them decided since *Baker* and then goes on to say:

> "In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all."

[fol. 228] Where compliance with State constitutional requirements will also vindicate the Federal right shown to have been infringed, a decree in accordance with State constitutional provisions is an obviously desirable form of remedy and the otherwise possibly very difficult problem of determining an appropriate remedy (a problem not solved by *Baker*) may become relatively simple. However, it remains clear under *Baker* that a Federal right exists quite independent of State constitutional provisions and is in no way dependent upon them for its enforcement through some appropriate remedy.

The second recent Supreme Court case which seems to us highly pertinent to the present controversy is *Scholle* v. *Hare*, 369 U. S. 429. That case involves an attack solely on the apportionment of the Michigan Senate. The Michigan House is apportioned about as closely as may be on a basis of population. This fact was certainly well known to

the Supreme Court of the United States when it remanded the *Scholle* case to the Supreme Court of Michigan for further consideration in the light of *Baker* v. *Carr, supra.* It is difficult for us to imagine a clearer indication (short of an express statement) than is given by this remand that the mere fact that one house of a State legislature is apportioned strictly in accordance with population does not im- [fol. 229] munize the apportionment of the other from attack under the Fourteenth Amendment on the ground that gross malapportionment of representation as regards population constitutes invidious discrimination.

In the majority opinion of this Court on the first appeal in this case we expressed the views (228 Md., at 433-34) that no precise and inflexible formula for representation is required or can be stated, that the State is allowed every reasonable latitude with regard thereto and that any discrimination which may exist therein will not be set aside if any state of facts reasonably may be conceived to justify it, and that "there is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We adhere to those views and we think the remand of the *Scholle* case supports them. The remand of that case appears to us to have been for the purpose of having the Michigan Court determine whether or not there was a rational ground upon which to support the allocation of representation in the Michigan Senate, which rather clearly involved marked disparities in voting power between different senatorial districts as regards population. The maximum disparity in Michigan, we note, was approximately 15 to 1 as against a maximum disparity in Maryland of [fol. 230] approximately 32 to 1. We think that the remand of the case of *W.M.C.A.* v. *Simon*, 370 U.S. 190, 82 S. Ct. 1234, for the court below (the United States District Court for the Southern District of New York) to be "the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination" supports our interpretation of the purpose of the

remand of the *Scholle* case. As we read the opinions filed in the Michigan Supreme Court following remand, the Court divided sharply on whether there was or was not a rational basis for the Michigan senatorial apportionment fixed by a constitutional amendment adopted in that State in 1952. In at least one respect, which may be of some significance, the Michigan case differs from the situation in Maryland. There, at the same election at which the apportionment under attack in *Scholle* was adopted by a popular majority of approximately 300,000 votes, another proposed constitutional amendment which would have apportioned the Senate on the basis of population was defeated by a popular majority of approximately 500,000 votes.[2] No similar choice has ever been submitted to popular vote in Maryland. Despite this popular vote and against historical-geographical arguments and the analogy to the Federal system, a majority of four out of the seven members of the Michigan Supreme Court participating held the 1952 [fol. 231] apportionment invalid. The case is now on appeal to the Supreme Court and the order of the Supreme Court of Michigan has been stayed by Mr. Justice Stewart.

The majority of this Court in the present case seems to accept tacitly, if not expressly, the view that if one house of the Maryland General Assembly (the Senate) may be apportioned on a basis which ignores disparities of population, the other house (the House of Delegates) must be apportioned with due regard to population, and assumes that the House of Delegates now is so apportioned. It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us. It is also true, however, that even as reapportioned by the May, 1962 Special Session of the General Assembly, considerable disparities still exist in a number of instances, though previous disparities have been materially reduced. Reference to Appendix A appended hereto will show the past and present situations with regard to the House and also the situation with regard to the Senate,

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[2] Cf. *W.M.C.A.* v. *Simon* on remand, 31 L.W. 2121, where a somewhat similar factor was one of several grounds upon which the existing New York apportionment was upheld.

which has not changed. There is no such close relationship between population and representation as in the case of the Michigan House, or between registered voters and representation as is declared necessary by the Federal District Court in Tennessee after remand of the *Baker* case. (31 L.W. 2003.) Surely, the present Maryland apportionment is not so closely related to population as is that of the [fol. 232] House of Representatives of the Congress of the United States. In that respect the Federal analogy is far from perfect.

Nor is it perfect in other respects. We still believe that there is some difference between the relationship of the States and the National Government and that of the counties and the State Government. We do not deny that State sovereignty is not what it once was and is far less significant today than it was in 1787 or 1789. It is true, however, that the Constitution of the United States does offer the States with small populations (no matter when they may have become members of the Union) a guarantee against being deprived of equal representation in the Senate without their consent. Counties, at least in Maryland, remain creatures of the State and they have no such constitutional guarantee.

Also, we think that the appellants are right in contending that Maryland does not fully follow the Federal pattern in another respect. The majority attempts to minimize the departure from the rule of one senator per political subdivision made in the case of Baltimore City. With all due deference to our brothers' reading of local history, the fact seems to stand out that these concessions to Baltimore City were granted, albeit grudgingly, in recognition of Baltimore's relatively large population and economic importance. There is no corresponding provision in the Federal Constitution.

Strictly, as a matter of history, the pattern of one senator per county or comparable political subdivision was in force only from 1851 to 1864. From 1837 to 1851 Baltimore City, [fol. 233] which was a part of Baltimore County, had one senator. Since 1864 it has had first three, later four, and since 1922, six. At the time of the last increase it had slightly over 50% of the population of the State, according

to the 1920 census. With 6 senators out of 29 it had about 21% of the representation in the Senate. It seems hardly necessary to point out that none of the six legislative districts comprised in the City of Baltimore constitutes a political subdivision of the State comparable to a county.

The majority attempts to bolster the Federal analogy by the argument that those who drafted the Fifth Amendment (many of whom had also participated in drafting the original Constitution) could not have thought that Due Process of Law guaranteed by the Fifth Amendment was infringed by the Equal Representation Clause applicable to the Senate, and then by first equating Due Process under the Fifth Amendment with Due Process under the Fourteenth (this equation being, we think, true) and by then further equating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. This argument seems to us highly strained. We know of no basis, historical or otherwise, for thinking that the provision for the equal representation of the States in the Senate—a representation of which no State may be deprived without its consent—was or was intended to be amended, limited, or construed by the Fifth Amendment. We may further note that, although in many instances the Due Process and Equal Protection Clauses may overlap, these two Clauses are separately expressed in the Fourteenth Amendment and that they con- [fol. 234] stitute limitations upon the States, not upon the Federal Government. A further, and we think in itself sufficient, answer to this contention is that *Baker* v. *Carr*, *supra*, rests squarely and expressly on the Equal Protection Clause and is the basis for the remand of *Scholle*.

The imperfections of the analogy to the Federal system are a relatively minor factor in the case, though the analogy itself is one of the main grounds upon which the majority relies. The other ground—and perhaps it really includes the Federal analogy ground—is that history furnishes a rational basis for geographical representation without regard to present glaring disparities in population between areas.

Up to a point, which it may be difficult to locate precisely, there is doubtless some merit to an argument based solely on history, but there must be a limit to its efficacy. A phrase

with which all lawyers are familiar is the old saying that the reason for something is historical rather than logical. How far can we go in adopting history as the guide for determining whether there is a rational basis for a patent discrimination? It is almost ironic that this malapportionment of representation to population in this case was (as well as is) worse in the Senate than in the House. Surely, the historical-geographical argument cannot be pushed to the logical extreme of contending that an uninhabited geographical area is entitled to representation in a legislative body. (We need not even stop to consider the problem of who would represent it.) Geography simply cannot be [fol. 235] divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other such subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed. A disparity of 32 to 1, we think, does exceed the permissible limit. In votes for the election of Senators that disparity exists as between voters in Baltimore County and voters in Kent County. If there were no other comparable disparities, it might be of little significance, but there are other comparable disparities; as reference to the figures in Appendix A will show. Thus the disparity as between voters in Prince George's County and in Talbot County is approximately 16½ to 1, as between voters in Montgomery County and in Garrett County it is approximately 17½ to 1, and as between voters in Anne Arundel County and Queen Anne's County it is approximately 12½ to 1. The maximum disparity in *Scholle* was 15 to 1. Without multiplying comparisons of one county with another, the following composite figures (taken from Appendix B), in which representation in the Senate is divided roughly into thirds, will reveal the general disparity between the most populous subdivisions of the State and the less populous subdivisions:

[fol. 236]

Units	1960 Population	Approximate % of State Population	Approximate % of Senate
Four most populous Counties and Baltimore City (10 Senators)	2,336,409	75	34½
Ten least populous Counties (10 Senators)	214,930	7	34½
Nine intermediate Counties (9 Senators)	549,350	18	31

To carry comparisons a step further, the fifteen least populous counties can elect 15 of the 29 Senators. These 15 counties have a combined population of 450,160, or a little over 14% of the State's total population of 3,100,869. That is, approximately one-seventh of the population can elect a majority of the State Senate.

Further comment can scarcely add emphasis to the figures shown in the above table and in the paragraph immediately following it.

The supposed Federal analogy was at least as well known to the Supreme Court as to us, but it did not prevent remand for consideration on the merits of apportionment in the State Senate in *Baker*, in *Scholle*, or in *W.M.C.A.* We cannot think of any logical reason for remanding a case to a lower court for the consideration of a patently untenable ground of constitutional attack. Of the three cases just cited *Scholle* seems most pertinent on this matter. The majority opinion in the instant case seeks to avoid what we think is a necessary implication from the remand of *Scholle* [fol. 237] on this point by saying that the Supreme Court did not decide the question. We think that what the Supreme Court has not decided is whether or not there is a rational basis for the Michigan senatorial apportionment.

We think that the majority of this Court dismisses rather too lightly decisions of the courts of other States or of lower Federal courts from a review of which it finds little to be gained. We think that on the whole these other recent

cases seem to support our views rather than those of the majority. In general, they regard both houses of a State legislature as subject to a requirement that there shall be some reasonable relationship between population and representation. This may be shown by a rational explanation of a departure from an exact ratio, and such an explanation will be more readily accepted as to one house if the other is exactly proportioned to population. Some, such as *Baker* v. *Carr*, *supra*, on remand (31 L.W. 2003) have deferred action as to one house if the other is almost exactly apportioned according to population.

The opinion of the United States District Court for the Middle District of Alabama, filed July 21, 1962, in *Sims* v. *Frink*, 205 F. Supp. 245, is carefully reasoned, and, in our estimation, supports the view that even exact, or almost exact, apportionment of one house in a State legislature in accordance with population does not entirely dispense with the need for some reasonable regard for population in the apportionment of the other. To like effect is another [fol. 238] very recent Federal District Court decision (July 23, 1962) in the Southern District of Florida, in *Sobel* v. *Adams*, —— F. Supp. ——. See, however, the more recent opinion of that court, —— F. Supp. ——,[3] also reported in the Miami Herald of September 6, 1962, upholding a proposed Florida constitutional amendment which affects both House and Senate, bringing apportionment of the former much more nearly in line with population, but permitting considerable disparities as to the Senate. It was held that population need not be "a major factor" in reapportionment of the Senate. The Supreme Court of Vermont (on July 20, 1962) in *Mikell* v. *Rousseau*, —— A. 2d ——, held the apportionment of the Senate of that State to be unconstitutional. A Kansas County District Court reached a like conclusion with regard to the Kansas legislature on July 27, 1962. A decision of the Court of Common Pleas of Dauphin County, Pennsylvania, cited by the appellees, expresses views in accord with what we regard as the general trend

[3] Subsequent to our filing of this opinion we have been advised that the two Florida decisions will be combined to make one report in the Federal Supplement; at this writing no citation is available.

and simply defers action. It does not involve a final determination on the merits. Nor did *Caesar* v. *Williams*, 371 P. 2d 241 (Ida.), decided April 3, 1962, reach a final decision on the merits. In Colorado the State Supreme Court in *Stein* v. *General Assembly*, 31 L.W. 2075, deferred requiring action but a Federal District Court in *Lisco* v. *McNichols*, 31 L.W. 2107, shortened the time of deferment.

The United States District Court for the Middle District of Tennessee, on remand of *Baker* v. *Carr*, *supra*, appears to have taken a view similar to ours that there should be an [fol. 239] "equitable" basis of reapportionment of the Tennessee Senate, even though it need not be "fully related to voting strength." See also *Toombs* v. *Portson*, 205 F. Supp. 248 (N.D., Ga.), 30 L.W. 2605, in which the District Court held that at least one house would have to be apportioned *strictly* on a population basis and did not decide whether both houses would have to be so apportioned.

A three-judge Federal District Court in Oklahoma has acted to bring about reapportionment of the legislature of that State. *Moss* v. *Burkhart*, —— F. Supp. ——, commented on in the "Judicial Highlights" section of the Federal Reporter Advance Sheets for July 9, 1962. Further action in that case (for which we presently have no F. Supp. citation) is reported in *Facts on File*, August 2-8, 1962, to have been taken on August 3, 1962.

In *Sweeney* v. *Notte*, —— A. 2d —— (R.I.), 31 L.W. 2060, the Supreme Court of Rhode Island, though holding that it could not take action to enforce its views in a reapportionment case said: "The Attorney General contends, and petitioners concede, that apportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. We are in full accord with such contention, but it is equally true that historical recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one-fourth of that enjoyed by others is, in our opinion so unjust as to be [fol. 240] invidiously discriminatory."

See also *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D., Ga), involving the Georgia primary election unit vote rule. Prob-

able jurisdiction has been noted but an application to advance for argument was denied in that case, *sub nom., Gray v. Sanders,* 370 U.S. 921, by the Supreme Court. That Court did not adopt the view of Mr. Justice Harlan that leave should be granted the appellants for a stay of the injunction issued by the District Court pending the determination of the appeal.

We also refer to the remarks of two University of Virginia political scientists, Messrs. Paul T. David and Ralph Eisenberg, at the recent annual convention of the American Political Science Association in Washington. They discussed the need for representation with reasonable regard to population in both houses of a state legislature and expressed views thereon, as reported in the Washington Post of September 6, 1962 (pp. 1 and A 8) in general accord with ours.

In the present case we think that the gross disparities which exist in relative voting power (and which are not even disputed, for they cannot be) cast upon the proponents of the existing apportionment the burden of showing a rational basis for such departures from any regard for population as a basis for representation. This burden, in our estimation, has not been met. Such provisions as we have here seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion [fol. 241] of political initiative spoken of in *MacDougall* v. *Green,* 335 U.S. 281, at 284. Neither the long continuance of disparities nor the magic phrase "Federal analogy" seems to us to furnish the rational basis for such disparities which is necessary to save them from constituting "invidious discriminations" under the Fourteenth Amendment, as we think that Amendment has been authoritatively interpreted by the Supreme Court in the cases above referred to and recently decided by that Court.

We, therefore, think that the decree of the Circuit Court should have been reversed.

See Opposite ☞

Unit	Population 1960	Prior to 5/31/62		After 5/31/62		SENATE	RELATIVE VALUES OF VOTES		
		No. of Delegates	No. Represented by Each Delegate	No. of Delegates	No. Represented by Each Delegate	No. of Senators	Per Cent(%) of Value of Vote to Statewide average		
							For Delegates		For Senator
							Prior to 5/31/62	After 5/31/62	
State-wide	3,100,689	123	25,210	142	21,837	29	100	100	100
Allegany	84,169	6	14,028	6	14,028	1	179	156	129
Anne Arundel	206,634	6	34,439	7	29,519	1	73	74	52
Baltimore	492,428	6	82,071	13	37,879	1	31	58	22
Calvert	15,826	2	7,913	2	7,913	1	319	276	675
Caroline	19,462	2	9,731	2	9,731	1	259	224	550
Carroll	52,795	4	13,196	4	13,196	1	191	165	203
Cecil	48,408	3	16,136	3	16,136	1	156	135	221
Charles	32,272	2	16,136	2	16,286	1	155	134	328
Dorchester	29,666	4	7,417	4	7,417	1	340	294	360
Frederick	71,930	6	11,988	6	11,988	1	210	183	149
Garrett	20,820	3	6,807	3	6,807	1	370	321	534
Harford	76,722	4	19,181	4	19,181	1	131	114	139
Howard	36,158	2	18,076	2	18,076	1	139	121	296

Unit	Population	Prior to 5/31/62		After 5/31/62			Per Cent (%) of Value of Vote to Statewide Average*		
		No. of Delegates	No. Represented by Each Delegate	No. of Delegates	No. Represented by Each Delegate	No. of Senators	For Delegates		For Senator
							Prior to 5/31/62	After 5/31/62	
State as a Whole	3,100,689	123	25,210	142	22,837	29	100	100	100
Kent	15,481	2	7,741	2	7,741	1	385	282	691
Montgomery	340,928	6	56,821	10	34,093	1	44	64	32
Prince George's	357,395	6	59,566	10	35,740	1	42	61	30
Queen Anne's	16,569	2	8,285	2	8,285	1	304	264	644
St. Mary's	38,915	2	19,458	2	19,458	1	129	112	249
Somerset	19,623	3	6,541	3	6,541	1	385	334	595
Talbot	21,578	3	7,193	3	7,193	1	358	308	665
Washington	91,219	6	15,203	6	15,203	1	166	144	317
Wicomico	49,050	4	12,263	4	12,263	1	206	178	218
Worcester	23,733	3	7,911	3	7,911	1	319	276	350
Baltimore City	939,024	96	26,001 **	39	24,082 **	6	97**	91**	68**

* Average number, statewide, of persons represented by each of 29 Senators, 106,920

** Citywide average without regard to inequalities between Legislative Districts

See Opposite ☞

Group 1 Baltimore City and Four Most Populous Counties:	1960 Population	Approximate % of Population of State	No. of Senators	Approximate % of Senate
Baltimore City	939,024	30.22	6	20.70
Baltimore County	492,428	15.88	1	3.45
Prince George's County	357,395	11.53	1	3.45
Montgomery County	340,928	10.99	1	3.45
Anne Arundel County	206,634	6.67	1	3.45
	2,336,409	75.29	10	34.50
Group 2 **Ten Least Populous Counties**				
Kent County	15,481	.50	1	3.45
Calvert County	15,826	.51	1	3.45
Queen Anne's County	16,569	.53	1	3.45
Caroline County	19,462	.63	1	3.45
Somerset County	19,623	.63	1	3.45
Garrett County	20,420	.66	1	3.45
Talbot County	21,578	.70	1	3.45
Worcester County	23,733	.77	1	3.45
Dorchester County	29,666	.96	1	3.45
Charles County	32,572	1.05	1	3.45
	214,930	5.94	10	34.50
Group 3 **9 Intermediate Population Counties:**				
Howard County	36,152	1.17	1	3.45
St. Mary's County	38,915	1.26	1	3.45
Cecil County	48,408	1.56	1	3.45
Wicomico County	49,050	1.58	1	3.45
Carroll County	52,785	1.70	1	3.45
Frederick County	71,930	2.32	1	3.45
Harford County	76,722	2.48	1	3.45
Allegany County	84,169	2.71	1	3.45
Washington County	91,219	2.94	1	3.45
	549,350	17.72	9	31.05

[fol. 245]

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

Brune, C.J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (specially assigned), JJ.

DISSENTING OPINION BY PRESCOTT AND MARBURY, JJ.—
Filed: September 25th, 1962

[fol. 246]

PRESCOTT AND MARBURY, JJ., separately dissenting:

As indicated therein, we fully concur in the able dissenting opinion of Chief Judge Brune. In addition, we deem it appropriate to call attention to the contrast between the conclusion reached by the present majority and what was said in the majority opinion on the first appeal in which two of the majority on the present appeal concurred.

Plaintiffs' bill of complaint alleges malapportionment in both the State Senate and the House of Delegates. The case first reached us after the trial court sustained demurrers to the bill. We reversed, stating that the Supreme Court had made "a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We then remanded the case with directions to the chancellor to determine whether representation in either or both Houses of the General Assembly was apportioned on a basis involving such discrimination. The chancellor found that the representation in the House was unconstitutionally malap-

portioned, but made no finding as to the Senate. We again [fol. 247] remanded for a decision as to the Senate. It is elementary that if the well-pleaded allegations of the bill failed to state a cause of action with reference to representation in the Senate, neither remand insofar as it concerned that branch of the Assembly was proper. Upon the remand no testimony whatever was taken. The defendants filed an answer in which they admitted substantially all of the allegations of the bill relating to malapportionment, but, even though the majority opinion stated what we quoted above, the defendants stated in their answer that "representation in the Maryland Senate need not be based on nor reasonably related to the present population of the Counties and Baltimore City [and the present majority opinion sustains this contention]." Essentially, the case reaches us now in the same posture as the first appeal, the only difference being that in the first appeal the demurrers admitted the well-pleaded allegations of the bill, and in the present appeal the answer admits them with minor and insignificant exceptions. On those facts which were held sufficient on the first appeal to state a cause of action as to the Senate as well as the House, the present majority now finds "nothing the Supreme Court cases [no case on malapportionment has been decided by the Supreme Court since our first opinion] to support the appellants' claim of invalidity in the apportionment of the Maryland Senate."

[fol. 248]

IN COURT OF APPEALS OF MARYLAND

No. 140—Adv.—September Term, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION et al.

v.

J. MILLARD TAWES, GOVERNOR, et al.

MANDATE

Appeal from the Circuit Court of Anne Arundel County.

Filed: July 2, 1962

July 23, 1962: Decree affirmed, appellants to pay the costs. Per Curiam Order. Opinion to follow. Brune, C.J., Prescott and Marbury, JJ., dissent.

August 2, 1962: Motion for Reargument filed.

September 11, 1962: Motion denied.

September 25, 1962: Opinion filed by Henderson, J., in which Brune, C.J., Prescott and Marbury, JJ., dissent.

September 25, 1962: Dissenting opinion by Brune, C.J. in which Prescott and Marbury, JJ., concur.

September 25, 1962: Dissenting opinion by Prescott and Marbury, JJ.

STATEMENT OF COSTS:

In Circuit Court:		
Record	$15.00	
Stenographer's Costs	30.00	
In Court of Appeals:		
Filing Record on Appeal		$ 20.00
Printing Brief for Appellant		738.50
Reply Brief		229.01
Portion of Record Extract—Appellant		

Appearance Fee—Appellant	10.00
Motion for Reargument	5.00
Printing Brief for Appellee	228.60
Portion of Record Extract—Appellee	
Appearance Fee—Appellee	10.00

[fol. 249] [File endorsement omitted]

IN THE COURT OF APPEALS FOR MARYLAND

Nos. 94 and 140 (Advanced)

September Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al., Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed September 28, 1962

I. Notice is hereby given that the Maryland Committee for Fair Representation, and all of the individual appellants of record herein, appeal hereby to the Supreme Court of the United States from the final judgment of the Court of Appeals for Maryland, filed in this case on September 25, 1962, a ruling which affirmed a decree of the Circuit Court for Anne Arundel County (Judge O. Bowie Duckett) that was filed in this action on June 28, 1962, denying the declaratory and injunctive relief sought by appellants' bill of complaint and adjudging Section 2 of Article III of the Constitution of the State of Maryland and the representation provided thereunder, to be valid and constitutional and not in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States. This appeal is taken pursuant to 28 U.S.C. 1257(2), and as permitted by 28 U.S.C. 2101(c).

II. The Clerk of this Court will please prepare a transcript of the record in this case (No. 13920 Equity in the Circuit Court for Anne Arundel County; No. 52, September Term, 1961, and Nos. 94 and 140 (Advanced), September Term, 1962, in this Court), for transmission to the Clerk of the Supreme Court of the United States, and include in said transcript the following:

1. The bill of complaint, with Exhibits A, B, C, D, E, F, G and H attached thereto, filed August 12, 1960.

2. Appellees' demurrers filed on September 10th and 16th, 1960.

[fol. 250] 3. Opinion and order of the Circuit Court for Anne Arundel County, sustaining appellees' demurrers and dismissing the bill of complaint, entered on February 21, 1961.

4. Opinion and mandate of the Court of Appeals for Maryland, entered on April 25, 1962.

5. Petition by Montgomery County, Maryland to appear as *amicus curiae*, and order of the Circuit Court for Anne Arundel County, Maryland permitting the same, entered on May 4, 1962.

6. Appellees' answers to the bill of complaint, with Exhibit 1 attached, filed on May 14, 1962.

7. Appellants' motion for summary judgment, filed on May 16, 1962.

8. Opinion of the Circuit Court for Anne Arundel County, Maryland, filed on May 24, 1962.

9. Decree of the Circuit Court for Anne Arundel County, Maryland, filed on May 28, 1962.

10. Order for an appeal, filed by appellants on May 28, 1962, in No. 94, September Term, 1962.

11. Order of the Court of Appeals for Maryland remanding the case to the Circuit Court for Anne Arundel County, filed on June 8, 1962.

* * * * * * * *

13. Supplemental opinion by the Circuit Court for Anne Arundel County, Maryland, filed on June 28, 1962.

14. Decree of the Circuit Court for Anne Arundel County, Maryland, filed on June 28, 1962.

15. Appellants' order for appeal, filed on June 28, 1962.

16. *Per curiam* order of the Court of Appeals for Maryland, entered on July 23, 1962 in No. 140 (Advanced), September Term, 1962.

17. Appellants' motion for reargument, filed on August 1, 1962.

18. Order of the Court of Appeals for Maryland denying motion for reargument, filed on September 11, 1962.

19. Opinion of the Court of Appeals for Maryland, filed on September 25, 1962, including dissenting opinions.

20. This notice of appeal, filed with the Court of Appeals for Maryland on September 28, 1962.

[fol. 251] 21. The Clerk's certificate of the above requested record.

III. The following questions are presented by this appeal:

1. Are the appellants and other citizens and eligible voters who reside in the five most populous political subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the Maryland General Assembly by Section 2 of Article III of the Maryland Constitution, which permits the five political subdivisions containing in excess of 76% of the population of Maryland only 34% of the total membership of the State Senate, while allowing a minority of 14% of the population of the State residing in less populous political subdivisions to elect a majority of the members of the Maryland State Senate?

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States being denied appellants and other citizens and voters of Maryland similarly situated, by the total representation provided for in both Houses of the Maryland General Assembly, under which citizens and eligible voters residing in the five most populous subdivisions of the State, and comprising over 76% of Maryland's population, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate?

Alfred L. Scanlan, 9806 Singleton Drive, Bethesda, Maryland.

John B. Wright, 12 Church Circle, Annapolis, Maryland.

Johnson Bowie, County Office Building, Towson, Maryland.

Of Counsel: Shea & Gardner, 734 15th St., N.W., Washington, 5, D.C.

Filed: September 28, 1962.

[fol. 252] Proof of Service (omitted in printing).

[fol. 253] Clerk's Certificate to foregoing Transcript (omitted in printing).

[fol. 254]

SUPREME COURT OF THE UNITED STATES

No. 544—October Term, 1962

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, et al., Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, et al.

Appeal from the Court of Appeals of the State of Maryland.

ORDER NOTING PROBABLE JURISDICTION—June 10, 1963

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

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OCT 24 1962
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. [redacted] 39

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL.
Appellees.

JURISDICTIONAL STATEMENT ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

ALFRED L. SCANLAN,
1606 Singleton Drive,
Bethesda, Maryland.

JOHN B. WHITE,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington, 5, D. C.
Of Counsel.

JOHNSON, HOWIE,
County Office Building,
Towson, Maryland,
Attorneys for the Appellants.

October 24, 1962

IN THE

SUPREME COURT OF THE UNITED STATES

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION (in behalf of its members), 4907 Redford Road, Bethesda, Montgomery County, Md.; W. F. STRONG, 301 Hillmoor Drive, Silver Spring, Montgomery County, Md.; NEWTON I. STEERS, 6601 River Road, Bethesda, Montgomery County, Md.; JOHN DOHERTY, 12 Revell Street, Annapolis, Anne Arundel County, Md.; BRUCE L. BOWMAN, 1423 Laurel Hill Road, Greenbelt, Prince Georges County, Md.; ANDREW M. BRISTOW, 8168 Glen Gary Road, Baltimore County, Md.; and SAMUEL HOPKINS, 4302 Wendover Road, Baltimore, Md. *Petitioners-Appellants,*

vs.

J. MILLARD TAWES, Governor, State House, Annapolis, Md.; BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LLOYD SIMPKINS, Secretary of State and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LOUIS L. GOLDSTEIN, Comptroller and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; THOMAS B. FINAN, Attorney General and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; HOOPER S. MILES, Treasurer and member of the BOARD OF STATE CANVASSERS, State Office Building, Annapolis, Md.; and JAMES LLOYD YOUNG, Clerk, Court of Appeals, and member of the BOARD OF STATE CANVASSERS, Court of Appeals Building, Annapolis, Md.; and BOARD OF ELECTION SUPERVISORS, Anne Arundel County, Court House, Annapolis, Md. *Respondents-Appellees*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No.

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL,

Appellants,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

JURISDICTIONAL STATEMENT

Appellants appeal from a judgment of the Court of Appeals for Maryland entered on July 23, 1962, with the majority and dissenting opinions announced on September 25, 1962. That judgment affirmed a decree of the Circuit Court of Anne Arundel County, Maryland (sitting as a court of equity), which had found Section 2 of Article III of the Maryland Constitution not to be in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. The trial court's decree did not grant the declaratory and injunctive relief sought by the appellants in their bill of complaint. The relief requested was based in part on appellants' contentions that the representation now provided for in the Maryland State Senate

in particular, and in the Maryland General Assembly as a whole, constitutes an invidious discrimination and an unconstitutional dilution of appellants' voting rights, as well as those of other citizens and eligible voters of Maryland similarly situated, in violation of Section 1 of the Fourteenth Amendment. This Statement is submitted to show that the Supreme Court of the United States has jurisdiction of the instant appeal, and that a substantial question is presented.

Opinions Below

The opinion and judgment of the Court of Appeals for Maryland has not yet been officially reported. It is set forth in Appendix A hereof. The pertinent opinions and decrees of the Circuit Court for Anne Arundel County have not been officially reported, but are printed in Appendix B hereof.[1] An earlier opinion of the Court of Appeals for Maryland in this case, issued on April 25, 1962, is reported at 228 Md. 412, 180 A. 2d 656.

Jurisdiction

Appellants' suit is based on Section 1 of the Fourteenth Amendment. It seeks declaratory and injunctive relief against violations of rights of suffrage arising out of the conduct of future elections for membership in the Maryland General Assembly on the basis of the malapportioned representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution. Appellants also complain of the unconstitutional dilution of their rights of suffrage which results from the unreasonable representation now provided for in the General Assembly as a whole, both by virtue of the aforesaid provision of the

[1] Judge Duckett's opinion of June 28, 1962 was unofficially reported in the *Daily Record*, July 2, 1962, p. 3. His opinion of May 24, 1962, also was unofficially reported in the *Daily Record*, May 28, 1962, p. 1.

Maryland Constitution and by Chapter I of the Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962. Art. 40, Sec. 42, Code of Md. (1962 Supp.).

On June 28, 1962, the Court of Appeals for Anne Arundel County held that Section 2 of Article III of the Maryland Constitution was not invalid under the Fourteenth Amendment, and refused the declaratory and injunctive relief sought in appellants' bill of complaint. The Chancellor's ruling was appealed to the Court of Appeals for Maryland. That Court affirmed his decree on July 23, 1962, in the form of a *per curiam* order, with three of the seven judges dissenting therefrom. A timely motion for reargument was denied without opinion in an order dated September 11, 1962. The majority and two dissenting opinions of the Court of Appeals for Maryland were announced on September 25, 1962. Appellants filed their notice of appeal on September 28, 1962. The jurisdiction of this Court to review the judgment below by direct appeal is conferred by 28 U.S.C. 1257(2) and 28 U.S.C. 2101(c). The following representative decisions sustain the jurisdiction of this Court to review the judgment on appeal in this case. *Williams* v. *Bruffy*, 96 U. S. 176, 183; *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 104; *Torcaso* v. *Watkins*, 367 U. S. 488, 489; and *Scholle* v. *Hare*, 369 U. S. 429, rehearing denied, 370 U. S. 906.

Questions Presented

1. Are the appellants and other citizens and eligible voters who reside in the five most populous subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the

Maryland General Assembly by Section 2 of Article III of the Maryland Constitution? This provision permits the five most populous political subdivisions, containing in excess of 76% of the population of Maryland, only 34% of the total membership of the State Senate, and allows a minority of 14% of the population of the State residing in less populous political subdivisions to elect a majority of the members of the Maryland State Senate.

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, being denied appellants and other citizens and voters of Maryland similarly situated, by the combined total representation provided for in both Houses of the Maryland General Assembly? The citizens and eligible voters residing in the five most populous subdivisions of the State, and comprising over 76% of Maryland's population, by virtue of Art. 40, Sec. 42, of the Maryland Code, and Article III, Section 2, of the State Constitution, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate.

Statutes Involved

Section 1 of the Fourteenth Amendment to the Constitution of the United States, Section 2 and former Section 5 of Article III of the Maryland Constitution, and Chapter 1, Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), are set forth in Appendix C hereof.

Statement

The appellees first demurred to the allegations of the bill of complaint shortly after it was filed in August, 1960. In its first decision in this case, the Court of Appeals for

Maryland overruled the demurrers. 228 Md. 412, 180 A. 2d 656. Appellees' subsequent answers raised no disputed questions of material fact. Following appellants' motion for summary judgment, the case was decided by the trial court exclusively upon the pleadings and exhibits filed and argument of counsel, without the taking of testimony or the introduction of evidence. The undisputed material facts may be summarized as follows:

1. *Present Population of the State and Existing Representation in the Maryland General Assembly.* According to the official census, the 1960 population of Maryland was 3,072,999. At that time, the combined population of the five most populous subdivisions of Maryland, which are the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, was 2,312,485. At present, slightly more than 76% of the population of Maryland live in these five most populous political subdivisions, while a little less than 24% of the population reside in the remaining 19 counties of the State.

Under Section 2 of Article III of the Maryland Constitution, each of the 23 counties of the State is given one Senator, with each of the 6 legislative districts of the City of Baltimore also entitled to one Senator. Until the Circuit Court for Anne Arundel County declared it to be in violation of the Fourteenth Amendment and null and void, Section 5 of Article III of the Maryland Constitution had prescribed the representation to be enjoyed in the House of Delegates by the various political subdivisions. The specific number of Delegates to which each political subdivision was entitled was expressly set forth in that Section of the Maryland Constitution. Temporary legislation, passed at a special session of the Maryland General Assembly held in May, 1962, has replaced the voided Constitutional provision. Art. 40, Sec. 42, Code of Md. (1962

Supp.). Representation in the House of Delegates now is expressly provided for in the statute which was enacted at the special session. The representation prescribed by the present statute has remained as previously authorized by Section 5 of Article III of the State Constitution, with the following exceptions: Baltimore County now has 13 instead of 6 Delegates; Montgomery and Prince Georges now have 10 Delegates each instead of 6 each; Anne Arundel County now has 7 instead of 6 Delegates; and the Third Legislative District of the City of Baltimore now has been given 8 Delegates and the Fifth Legislative District, 7 Delegates, rather than the 6 Delegates to which each of those two Districts formerly had been entitled under Section 5 of Article III of the State Constitution.

The four most populous counties and the six legislative districts of the City of Baltimore have one member each in the Maryland State Senate. This constitutes approximately 34% of the representation in the Senate. The remaining 19 counties have one member each, or approximately 66% of the representation provided for in the upper chamber of Maryland. Prior to the filing of this suit, and until the enactment on May 31, 1962 of temporary reapportionment legislation at a special session of the General Assembly, the five most populous subdivisions of the State were allotted 60 Delegates out of the 123 members of the House of Delegates. The 19 less populous counties were given 63 Delegates, or 51% of the total membership of the House of Delegates. At the present time, the five most populous subdivisions are afforded 79 Delegates, or 55% of the total membership of the House of Delegates, while the remaining less populous counties continue to have 63 Delegates, which now makes up 45% of the total membership of 142.

2. *Discrepancies of Representation in the Maryland State Senate.* Less than 15% of the population of Maryland can

elect a majority of the State Senate. One Senator from Baltimore County, with a population at the present time of approximately 500,000 people, is elected by more people than are required to elect a majority of the entire State Senate. If representation were based strictly on the 1960 population of Maryland, each Senator would represent approximately 106,000 people. On that basis, a citizen's vote for a State Senator in the most under-represented populous county of Maryland is worth only 3% of the vote of a resident from the most over-represented and least populous county.

The four most populous counties, with a combined population now very close to 1,500,000, and constituting nearly 47% of the total population of the State, enjoy less than 14% of the representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution. As of January 1, 1963, population projections indicate that Montgomery and Prince Georges Counties will have a combined population of approximately 800,000, or 25% of the State total, yet will have less than 7% of the total representation in the Senate. The City of Baltimore, with a little over 900,000 people, has 6 State Senators, while the four most populous counties previously referred to, with nearly 1,500,000 people, have a combined total of 4. Substantial discrepancies in Senate representation also exist within the class of the less populous political subdivisions. For example, one county with a 1960 population slightly in excess of 90,000 people has 1 State Senator, while another county with a population of less than 17,000 also has 1. The Senator from Montgomery County represents more than 22 times as many persons as the Senator from Kent County. Each year the population of Montgomery County is increasing more than the entire present population of Kent County.

3. *Present Representation in the House of Delegates.* Immediately after a decision rendered on May 24, 1962 by

the Circuit Court for Anne Arundel County, declaring Section 5 of Article III of the Maryland Constitution to be in violation of the Fourteenth Amendment, a special session of the General Assembly of Maryland was convened. On May 31, 1962, the special session passed stopgap legislation, adding 19 new Delegates to the House of Delegates, temporarily raising its membership to 142.[2] As stated, Baltimore County was allotted 7 of the new Delegates, Montgomery County and Prince Georges, 4 each, Anne Arundel County, 1, the Third Legislative District of the City of Baltimore, 2, and the Fifth Legislative District, 1 additional Delegate. Before the enactment of this special legislation, the maximum dilution in voting rights which had existed among the political subdivisions in the House of Delegates was approximately 12 to 1. This maximum has now been reduced to 6 to 1. The five most populous political subdivisions, in which live in excess of 76% of the population, at present have 55% of the total representation in the House of Delegates. Unlike the United States House of Representatives, where only 5 out of 436 Congressional seats, or 1%, fail to meet the the minimum average population requirement, some 33, or 23%, of the total of 142 seats in the House of Delegates are permitted the less populous political subdivisions apart from the 30 seats to which they are entitled on a straight population basis. On any basis of a minimum population ratio requirement, these areas would not be entitled to those 33 Delegates.

The four suburban counties, with approximately 47% of the State's population, are given a little less than 28% of the representation in the present 142 member House of

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[2] Art. 40, Sec. 42, Code of Md. (1962 Supp.). Unless superseded by an amendment to the Maryland Constitution, the temporary legislation enacted by the special session will automatically expire on January 1, 1966. An amendment requires that three-fifths (3/5) of each house of the General Assembly approve the referendum before it can be submitted for a vote of the electorate.

Delegates. If representation were based on population, but permitting at least one Delegate for every County, the five most populous subdivisions would be entitled to a minimum of 105 Delegates out of the 142 for which provision was made by the Act of May 31, 1962, rather than the 79 seats they now have. The 19 less populous counties, on the other hand, would be entitled to no more than 30 Delegates, rather than the 63 which they now have.

4. *Revenues Contributed and State Funds Returned.* In Maryland, significant portions of the revenue collected by the State from various types of taxes are returned to the local political subdivisions on the basis of equalization formulae enacted by the General Assembly. Under most of these formulae, the five most populous political subdivisions contribute proportionately greater tax revenues, yet receive proportionately less funds back from the State, than do the less populous political subdivisions. For example, in 1959 under the equalization formula applying to return of funds collected through the motor vehicle fuel tax, Anne Arundel, Baltimore, Montgomery and Prince Georges, in which approximately 46% of the motor vehicles of Maryland are registered, received back approximately 12% of the tax revenues returned by the State.

5. *Futile Efforts to Have the Legislature Reapportion Itself in the Absence of a Controlling Court Decision.* Neither in the Maryland Constitution nor in the statutes is there any provision for reapportioning the General Assembly. The Maryland Constitution does not provide for the initiative. For an amendment to the State Constitution to be submitted to the people on referendum, a vote of three-fifths of both houses of the legislature is required.[3] Aside from the limited and temporary reapportionment of the House of Delegates enacted at the 1962

[3] Art. XIV, Section 1, of the Maryland Constitution.

special session, following the decision of the trial court in striking down Section 5 of Article III of the Maryland Constitution, since 1867 all efforts to obtain a reapportionment of the General Assembly, with two other exceptions, have been futile. In 1900, the City of Baltimore, because of its expanding population, was given an additional State Senator and an additional legislative district, making a total of 4; 2 more Senators and 2 more legislative districts were added to Baltimore's representation in 1922. Apart from these increases of Senate representation for the City of Baltimore, membership in the Maryland State Senate remains as provided for in the Constitution of 1867. Until 19 Delegate seats were created and distributed among the five most populous political subdivisions at the 1962 special session of the Maryland General Assembly, representation in the House of Delegates was authorized on the basis of a limited population formula adopted in the Constitution of 1867. However, a ceiling was imposed in 1950 which froze representation in the lower House on the basis of representation established in reliance on the Federal census of 1940. The purpose of this amendment was to prevent the smaller counties from continuing to receive increased representation at the further expense of the larger political subdivisions which, under the 1867 formula, were not entitled to any more than 6 Delegates once their population had reached 55,000, no matter how much it might increase thereafter.

From 1951 through 1960, 11 proposals were introduced at the Maryland General Assembly to reapportion only the House of Delegates. None were enacted. Nor did any move so far as to reach a final vote on the merits. Nearly a dozen reapportionment amendments were introduced at the 1961 and 1962 sessions of the Maryland General Assembly. None of these were passed.

While the Constitution of Maryland provides that the General Assembly is to provide for "taking the sense of the people" in regard to calling a constitutional convention every twenty years,[4] no constitutional convention has been convened since 1867. A constitutional convention would have the power to propose amendments to the Maryland Constitution, including amendments to reapportion representation in the General Assembly. Although in November, 1950, the electorate approved the calling of a constitutional convention by a vote of 200,439 to 56,998, the General Assembly has consistently declined to convene one. Legislation proposing that a convention be summoned was introduced at sessions of the General Assembly held in 1951, 1954, 1955, 1957, 1960, 1961 and 1962. None of these proposals were enacted. One convention bill passed the House of Delegates in the closing days of the 1961 legislative session. However, after legislators from the less populous subdivisions had attacked the proposal as a "frightening device" to secure reapportionment, the convention bill was defeated in the State Senate by a vote of 17 to 11, all the Senators but one from the less populous counties voting against it.

6. *Proceedings Below.* Appellants filed their bill of complaint in the Circuit Court for Anne Arundel County, Maryland on August 12, 1960. They sought a declaratory judgment that the existing representation as then provided in the Maryland House of Delegates and State Senate by virtue of Sections 2 and 5 of Article III of the Maryland Constitution, violated Section 1 of the Fourteenth Amend-

[4] Art. XIV, Section 2, of the Maryland Constitution. Representation in a constitutional convention, if the legislature finally did convene one, would be on the same malapportioned basis as now exists in the General Assembly itself.

ment.[5] In addition to seeking declaratory relief, appellants asked for injunctive relief against the conduct of the 1962 elections to the Maryland General Assembly "and thereafter" (R. 20-21).

Appellees' demurrers were sustained by the trial court on February 21, 1961 on the grounds that issues presented raised political questions beyond the jurisdiction of the Court to decide. On appeal to the Court of Appeals for Maryland, this first decision of the Chancellor was reversed, and the case remanded for determination of the Federal questions presented. 228 Md. 412, 180 A. 2d 656. Upon remand, and after the appellees had answered the bill of complaint, but had not disputed any of its material allegations, the case was again heard by the trial court on appellants' motion for summary judgment. On May 28, 1962, the Chancellor entered an order declaring Section 5 of Article III of the Maryland Constitution, which provided for representation in the House of Delegates, to be in violation of the Fourteenth Amendment and null and void. (App. B, p. 74). However, he attempted to reserve judgment with respect to the constitutionality of the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution. Appellants took an appeal from the May 28, 1962 decision on the day it was issued (R. 120). The Court of Appeals then directed that the lower Court promptly determine the issue of the constitutionality of Section 2 of Article III. On June 28, 1962, the Circuit Court for Anne

[5] Appellants also contended that the failure to reapportion the Maryland General Assembly violated certain provisions of the Maryland Constitution and the Maryland Declaration of Rights. These issues of State law are no longer in the case, *Md. Comm. for Fair Rep.* v. *Tawes*, 228 Md. 412, 425, 180 A. 2d 656, 662. Since there were individual plaintiffs, appellees' challenge to the standing of the Committee plaintiff was resolved in favor of the latter's standing to sue, 228 Md. 412, 420 fn. 5, 180 A. 2d 656, 660 fn. 5.

Arundel County issued a decree and filed an opinion holding that the present representation in the Maryland State Senate did not violate the Fourteenth Amendment. Appellants immediately appealed to the Court of Appeals for Maryland.[6]

The Court of Appeals heard the case in a special session held on July 23, 1962. In the afternoon of that day, the Court issued a *per curiam* order, with three judges dissenting, affirming the judgment of the trial court. A timely motion for reargument was denied on September 11, 1962. On September 25, 1962, the Court filed its opinion, three judges dissented, and two dissenting opinions were filed, one written by Chief Judge Brune, the other by Judge Prescott (App. A, pp. 37-63).

7. *How the Federal Question Was Presented.* Appellants' claims that rights of suffrage guaranteed them by the Fourteenth Amendment were being violated by elections to the General Assembly conducted on the basis of the representation provided both in the Maryland House of Delegates (R. 11) and in the State Senate (R. 11), as well as by the legislature's failure to reapportion the General Assembly as a whole (R. 20), were expressly asserted in their bill of complaint, and again made in their motion for summary judgment (R. 118). These contentions of law were disputed, first in the demurrers (R. 47), and then in the answers filed by the appellees (R. 130-131). Following Judge Duckett's decree of May 28, 1962, appellants promptly appealed (R. 120). After the Court of Appeals remanded the case to the trial court for his prompt determination of the Senate question, the case was once more heard by the lower court. At this second hearing,

[6] Appellant's earlier appeal of the trial court's decision of May 28, 1962 was aborted when the Court of Appeals remanded the case to the Chancellor, with directions to determine the Senate question promptly (R. 121).

appellants also contended both in brief and oral argument in support of their pending motion for summary judgment that population constitutionally could not be disregarded as a basis for representation in the State Senate, but if it could, then their rights of representation in the Maryland General Assembly as a whole were being violated, with equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment, thereby being denied them.

On appeal to the Court of Appeals for Maryland from the trial court's decision of June 28, 1962 (App. B, p. 75), appellants once more contended, both in their briefs and oral argument, that the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution was in violation of the Fourteenth Amendment. Alternatively, they argued that if the lower court was correct in holding that population could be completely ignored as a basis for representation in the Maryland State Senate, then the appellants' rights of suffrage and representation in the General Assembly as a whole were being violated in a manner prohibited by Section 1 of the Fourteenth Amendment. Appellees resisted both of these contentions. They also argued that appellants had waived their right to question the constitutionality of representation in the General Assembly as a whole because of their failure to challenge specifically the stopgap reapportionment of the House of Delegates through the temporary legislation which had been enacted at the May 1962 special session of the Maryland General Assembly.[7] The Court below sustained the Chancellor's decision that population need not be taken into account in the composition of the Maryland State Senate (App. A, p. 37.) Impliedly at least, it also rejected appellants' alternative contention that the representation now afforded

[7] Article 40, Sec. 42, Code of Maryland (1962). See fn. 2, *supra*.

residents of the more populous political subdivisions in the General Assembly as a whole offends Section 1 of the Fourteenth Amendment (App. A., p. 38).

The Questions Are Substantial

The issues raised on this appeal are of grave and enduring importance to all branches of the Maryland State Government and to all its citizens. Fundamentally, the question is whether the State is providing in the composition of the Maryland General Assembly the constitutional minimum of representative government and reasonable distribution of voting rights required by the Fourteenth Amendment. The importance of the issues presented, however, transcend the boundaries of the State of Maryland. They bear upon the operation of state government in practically all of the States of the Union. It is not easy to contemplate constitutional issues more fundamental than those raised in this appeal. Their determination, one way or another, will have a definitive, far reaching, and long enduring impact on the nature, scope and direction of state government for generations to come.

The importance of the issues presented in the instant case requires that they be authoritatively dealt with by this Court and no other. The need for this Court to speak decisively is accentuated by the directly conflicting results which have been reached in some of the lower State and Federal courts. Plainly, the Fourteenth Amendment cannot require one thing of Michigan, but not of Maryland. The divergent decisions of the lower courts on the grave constitutional questions surrounding attempts to invoke the Fourteenth Amendment against a grossly malapportioned legislature should be superseded by the final and controlling determination of this Court.

Appellants believe that the error of the Court below in deciding the issues adversely to the appellants is as obvious as the importance of those questions is clear. If the decision of the Court below is permitted to stand, then this Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, may fairly be regarded as an exercise in futility, mere judicial jousting about jurisdiction and justiciability. Thus interpreted, the *Baker* decision will have no permanent effect on substantive constitutional law, save to permit the continued existence of the nationwide evil of gross malapportionment, at the curtailment or elimination of which many had understood that historic ruling to have been directed.

If it is true that what was thought to be the basic thrust in *Baker* v. *Carr*, *supra*, can be blunted or circumvented on the basis of the rationale assigned by the majority of the Maryland Court of Appeals in reaching the decision appealed here, then the struggle for the revival of representative government in State legislatures all over the country might as well be abandoned. If gross malapportionment in either one or both houses of a State legislature is to be judged immune from the requirements of the Fourteenth Amendment by virtue of the fact that it has long existed, or because it can be superficially rationalized as constituting a system of Government thinly analagous to the structure of the United States Congress, then any future efforts to obtain even reasonably fair representation in the legislative chambers of the States are doomed to failure. Absent a controlling decision by this Court making it clear that *Baker* v. *Carr* was intended to achieve more than to establish a procedural or jurisdictional point, the invidious discrimination in rights of suffrage which, for a while, escaped reform through the temporary refuge provided by the "political question" doctrine, will continue unabated throughout the United States.

Appellants state below in more detail why they believe that the constitutional questions presented on this appeal are substantial and should be considered and resolved by this Court.

A. *The Importance of the Constitutional Issues Involved.* Upon the determination of the Constitutional issues raised by this appeal will rest the future course of representative government in the State of Maryland. If the closely divided decision of the Court below, holding that population can be completely disregarded in the representation provided in the State Senate, is allowed to stand, an ever diminishing minority of the population of Maryland will have been permitted the perpetual right, through its position of unnatural preference and power in the Maryland State Senate, to thwart any legislation introduced in the Maryland General Assembly which the representatives of the ruling minority may oppose. This will hold true even in those cases where an overwhelming majority of the people of the State would prefer the enactment of legislation opposed by the controlling minority. The Court of Appeals for Maryland, therefore, was not far from the mark when it stated at the outset of its first opinion in this case:

> "In its entire history, this Court has seldom, if ever, been called upon to decide a case of greater, or more far-reaching, importance than the case at bar. It involves the composition and proper organization of the State Government itself, and the correlative duties and responsibilities of the coordinate branches thereof. The problem calls for the best efforts of all three branches of the State Government in order to furnish to the people of Maryland, without the uncertainties of an interregnum and its attendant risk of chaos,

an orderly and continuous system of self-government that will not violate any of the provisions of the Maryland or Federal Constitutions."[8]

The injustice and the unconstitutional dilution of rights of suffrage, for relief against which appellants now have come to this Court, have long existed in Maryland. Nearly thirty-five years ago, the acidulous H. L. Mencken was provoked to lament:

> "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern shore counts as much as the votes of twelve Baltimoreans. But that can't last. It is not only unjust and undemocratic; it is absurd."[9]

While appellants regret Mencken's lack of charity, they equally regret his conspicuous failure as a prophet in this instance. Unfortunately, with the exception of a mild reapportioning of the House of Delegates achieved at the May 1962 special session of the General Assembly, the unjustified political preference bestowed on a small minority of the voters of this State through a malapportioned legislature, especially the Senate thereof, not only has lasted, but has increased since Mencken's bitter outburst. True, the principal victims of what has been labeled "Barnyard Government" in Maryland may no longer be the voters of the City of Baltimore, but are now the partially disfranchised inhabitants of the suburban counties. Still, no one can dispute the fact that minority rule in the General Assembly of Maryland has not been shaken, much less toppled. In the Maryland Senate, the vote of one resident

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[8] *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 417, 180 A. 2d 656.

[9] *Baltimore Evening Sun*, July 23, 1928, p. 15.

of the lower Eastern Shore now counts as much as the votes of thirty-two residents of Baltimore County! What Mencken thought could not last because of its absurdity continues to exist, to grow more absurd, and to an even greater extent, to deny the constitutional rights of those against whom the system discriminates.[10]

Apart from what some might consider merely the abstract injustice inherent in the unfair apportionment of representation which now prevails in the Maryland General Assembly, practical consequences ensue to the disadvantage of the partially disfranchised voters of the State, for whom the appellants believe they speak. For example, the record is clear that the voters and taxpayers of the City of Baltimore and the suburban counties are being discriminated against, both with respect to the revenue contributed to the State as taxes, and with respect to funds received back from the State. (R. 8, 11). This financial discrimination results from the unfair equalization formulae which control the manner and amount of the return of State funds to the local political subdivisions. These formulae, it need hardly be stated, were put into the statutes by the rural minority which has so long dominated the Maryland General Assembly. They resist, to the effective utmost, all changes in the equalization formulae which might have the effect of returning any reduced share to the less populous political subdivisions.

In Maryland, malapportionment has an additional and singularly adverse consequence. It supplies the basis for the unfair unit rule system of voting which prevails at the primary election of State-wide officials, including the Governor, United States Senator, Attorney General and Comp-

[10] *Lucas, Barnyard Government in Maryland*, Reporter Magazine, April 12, 1962, p. 31.

troller.[11] Under this undemocratic, rotten borough system, a candidate for one of those offices can be nominated only if he receives a majority of unit votes, which are based on the representation a county or political subdivision enjoys in the General Assembly. Three times in twelve years, a candidate for State-wide office receiving a majority of the popular votes cast in a primary has been denied the nomination because of the operation of the unit rule. Gross malapportionment in Maryland, therefore, corrodes more than the General Assembly; it touches also the executive branch. Its operation places aspiring candidates for State-wide offices from the more populous political subdivisions under an artificial and completely unjustified handicap.[12]

Important as the issues in this case are to the present and future voters of Maryland, they reach beyond the boundaries of the Free State. A recent summary reveals that as the summer of 1962 drew to a close, more than 30 reapportionment cases were pending in the courts of 31 States of the Union. *New York Times*, August 28, 1962, p. 18; *Wall Street Journal*, August 9, 1962, p. 7; see also, *The Municipal Attorney*, Vol. 3, No. 5, May, 1962, p. 67, *et seq.* This plethora of pending cases constitute another compelling reason why there should be an authorita-

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[11] Art. 33, Secs. 79 and 80, Code of Md. (1957). The recent stop-gap reapportionment of the House of Delegates expressly avoided any similar revision of the unit rule requirement. Art. 40, Sec. 42(i), Code of Md. (1962 Supp.).

[12] Should this Court sustain the lower court's decision in the Georgia unit rule case, *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D. Ga., 1962), prob. juris. noted and motion to advance pend., 370 U.S. 921, elimination of the inequities inherent in the Maryland unit rule system might be achieved independently of a reasonable reapportionment of the General Assembly. A suit has been filed in the Circuit Court for Anne Arundel County, Maryland, challenging the constitutionality of the Maryland unit rule system, *John Doe, et al.* v. *Richard Roe, et al.*, Equity No. 14986. No further proceedings have taken place since the filing of the bill of complaint on May 8, 1962.

tive determination by this Court as to the standards which control and mark out where constitutional legislative discretion ends and where gross or unconstitutional malapportionment begins.

The epidemic of reapportionment cases which followed this Court's historic decision in *Baker* v. *Carr*, 369 U. S. 186, reflects more than pent up dissatisfaction with the bare injustice or inequity of malapportionment in legislative representation which produces unreasonable dilution in the value of voting rights as between citizens of the same State. Rather, the outpouring of recent litigation reflects a revived hope on the part of the residents of the urban and suburban areas of the various States that at last they may have some fair opportunity to break what has been accurately called "the rural stranglehold" on State legislatures.[13] The decay of large cities, and the unprovided for expansion of suburban areas, financial and planning crises in education, housing, transportation, water, sewage and urban redevelopment are the unpleasant hallmarks of almost every metropolitan area in the United States.[14] These current and common vicissitudes of present urban and suburban existence are, in large measure, the consequence of unrepresentative, rurally dominated, State governments, and the neglect and indifference which the legislators from the less populous areas manifest toward the problems which beset their fellow citizens residing in the urban and suburban areas of a state.[15]

It may be that, despite its decision in *Baker* v. *Carr*, *supra*, this Court ultimately will find nothing in the Fourteenth Amendment which prevents the continuation of

[13] Lerner, America as a Civilization, 342 (1957).

[14] *Lewis, Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1058 (1958).

[15] *Harvey, Reapportionment of State Legislatures—Legal Requirements*, 17 Law and Contemp. Probs., 364, 376 (1952).

built-in minority rule in the legislative chambers of the States. However, if that judgment is to be the final outcome of the struggle for judicial relief from gross malapportionment, it is a determination that only this Court should make. Neither the Maryland Court of Appeals, the Michigan Supreme Court, nor any other lower State or Federal court of the country should be permitted the last word, especially since they do not seem to agree as to what it should be. Appellants, therefore, believe the importance to Maryland and to the Nation of the constitutional issues presented on this appeal, and the necessity for this Court to pass upon them, to be self-evident. As the Solicitor General recently put it:

> "*Reapportionment.* It is hardly necessary to argue the importance and divisiveness of this issue. The character of the legislative apportionment determines the basic nature of our government. If voting strength in a legislature is apportioned according to population or the number of qualified voters in any district, there is in truth adherence to the principle of majority rule, but perhaps at the expense of minority interests. Where a city vote is worth one-twentieth or one-fiftieth the vote of a rural legislator, government is by the minority. Nor is this just a matter of principle. The failure of State governments to meet modern problems and majority needs, especially the burgeoning problems of urban and metropolitan regions, is partly the result of the fact that the majority of the people, even large majorities, do not control the legislatures. The failure leads to public cynicism, disillusionment and loss of confidence. Reapportionment would be one of the best methods of encouraging vigorous and re-

sponsible State and local government and thus reversing the tendency of the cities to look to the national government for progressive solutions.[16]

B. *Conflicting Decisions Among the Lower Federal and State Courts.* Appellants argued below that the Fourteenth Amendment does not permit population to be completely disregarded in the composition of the Senate of the Maryland General Assembly, especially in view of the fact that the lower House thereof is only slightly weighted in favor of population. The Court of Appeals for Maryland in a 4 to 3 decision has held otherwise. These are issues which this Court has not squarely considered, much less determined. Cf. *Scholle* v. *Hare*, 369 U.S. 429. Moreover, the lower Federal and State courts of the Country which have had occasion to pass upon the question of whether population may be disregarded in at least one house of a State legislature, are divided on that particular issue. For instance, after this Court remanded *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W. 63, vacated and remanded 369 U.S. 429, the Supreme Court of Michigan held, in a 4 to 3 decision, that rights possessed under the Fourteenth Amendment by eligible voters of the urban districts of Michigan were violated by the representation provided in the Michigan State Senate through provisions of the Michigan Constitution, where the lower house is based on population but where slightly in excess of 30% of the population now can elect a majority of the Senate, and where the maximum discrepancy in the representative ratio of senatorial districts reaches 13 to 1. 367 Mich. 176, 116 N. W. 2d 350. We will not argue here the reasons, some

[16] *Cox, The Nature of Supreme Court Litigation*, address before the Federal Bar Association, Washington, D. C., September 8, 1962, pp. 4-5; also partially reported in the *Washington Post & Times Herald*, September 9, 1962, p. A-25.

of which are touched upon in Chief Judge Brune's dissenting opinion below (App. A, p. 46), why appellants believe that, if the Michigan case has been decided correctly, then the case for a reversal of the decision of the Court of Appeals for Maryland is even more compelling.[17]

A three-judge Federal Court in Oklahoma has struck down all of Oklahoma's reapportionment laws, pertaining both to the Oklahoma Senate and to the lower house of the legislature. *Moss* v. *Burkhart* —— F. Supp. —— (W.D. Okla., 1962). In Oklahoma, under the legislation voided by the Federal Court, 26% of the population was required to elect a majority of the State Senate, while the maximum discrepancy in representation between Senatorial districts was about 30 to 1, or close to the maximum dilution found in the instant case, which is 32 to 1.

Following the remand of this Court's decision in *Baker* v. *Carr*, a three-judge Federal Court of the Middle District of Tennessee rejected the meagre reapportionment measure through which the Tennessee legislature had attempted to comply with what the Fourteenth Amendment requires. *Baker* v. *Carr*, —— F. Supp. —— (M.D. Tenn., 1962). In disapproving the Tennessee reapportionment legislation, the Court observed that should the State Senate "be apportioned on an equitable basis [though] not fully related to voting strength, it would be necessary to apportion the House of Representatives on the basis of number of qualified voters alone," without affording any minimum representation in the lower House based merely on existence as a county.

Again, in *Sims* v. *Frink*, —— F. Supp. —— (M.D. Ala., 1962), a Federal court refused to accept a proposed reapportionment of the Alabama legislature through a so-

[17] A petition for certiorari in *Scholle* v. *Hare*, now captioned *Beadle* v. *Scholle*, No. 517, October 1962 Term, was filed on October 15, 1962.

called Federal plan of representation, under which the Alabama House would have been based on population, while the Senate would have been composed of one Senator from each of the 67 counties of Alabama, without regard to population. Under the proposed constitutional amendment, 19.4% of the population of Alabama would have had majority control of the State Senate. The Court then went on to issue an opinion ordering the temporary reapportioning of both the Alabama Senate and House of Representatives on a basis related to population.[18]

On the other hand, a three-judge District Court in the Northern District of Georgia recently divided 2 to 1 over the question of whether the Fourteenth Amendment was satisfied by a proposed constitutional amendment under which the Georgia Senate would be apportioned exclusively according to population, while the composition of the House of Representatives would allow one member from each of the 159 counties of the State. The majority apparently were of the opinion that this arrangement comported with the Federal Government's basic structure, with the House of Representatives based on population and the Senate on geography. For that reason, the Court felt that the proposed amendment could not be classified as the invidious discrimination which is prohibited by the Fourteenth Amendment. Circuit Court Judge Tuttle dissented. *Toombs, et al* v. *Fortson, et al*, —— F. Supp. —— (N.D. Ga., September 5, 1962).

A three-judge Court for the Southern District of Florida has ruled that a proposed constitutional amendment for the reapportionment of the Florida legislature, under which

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[18] On August 25, 1962, a Justice of this Court refused to grant a stay of the decision in *Sims* v. *Frink*, pending the filing of a petition for certiorari. *Washington Post & Times Herald*, August 26, 1962, p. A-7. An appeal was filed in this Court on October 12, 1962, *Reynolds* v. *Sims*, No. 508, October, 1962 Term.

eight new Senators and forty new Representatives were to be created, and, for the most part, to be allotted to the more populous political subdivisions of Florida, if approved by the voters, would satisfy the requirements of the Fourteenth Amendment. *Sobel* v. *Adams*, —— F. Supp. —— (S.D. Fla., September 5, 1962). Under the Florida plan, representation in the House of Representatives is to be apportioned by a formula "in which population is heavily weighted." Because of that, the Court was of the view that "population need not be a major factor in the apportionment of the Senate," although it conceded that the apportionment in the upper house still must be made "upon a rational basis."

On remand, following this Court's decision in *WMCA, Inc.* v. *Simon*, 202 F. Supp. 741 (S.D. N.Y., 1962), vacated and remanded, 370 U.S. 190, a three-judge District Court dismissed a complaint alleging invidious discrimination against residents of the urban and suburban areas of New York State, resulting from alleged malapportionment of representation in the New York State Senate and Assembly. *WMCA, Inc.* v. *Simon*, —— F. Supp. —— (S.D. N.Y., 1962), appeal docketed as No. 460, October Term, 1962. From the facts of the New York case, as appellants understand them, it appears that the ten most heavily populated counties of the State, containing roughly 73.5% of the 1960 population of New York, enjoy 65.5% of the Senate seats, and 62% of the Assembly seats.[19]

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[19] The New York appeal also raises questions regarding rulings of the lower court rejecting evidence offered by the appellants to prove a legislative intention to discriminate, issues that are not present in the instant case, where none of the material allegations of the bill of complaint have been contested (App. A, p. 62). So far as Senate representation is concerned, the maximum dilution in New York appears to be 4.9 to 1, as contrasted to the 33 to 1 maximum which exists in the case of Maryland's Senate.

The contradictory results arrived at in the lower courts accentuate the necessity for this Court to take up, and authoritatively decide, the pressing and important question of what are the minimum requirements of the Fourteenth Amendment when that article of freedom and fair play is invoked to support a claim of invidious discrimination in voting rights resulting from gross malapportionment of representation in one chamber or both houses of a State legislature. To this extent, appellants agree with the majority of the Maryland Court of Appeals, who, after reviewing some of the conflicting decisions in the lower courts, stated:

> "In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States." [20]

C. The Constitutional Issues Were Erroneously Decided

Appellants contended in the Courts of Maryland that representation in the Maryland State Senate, where 14% of the population of the State hold a majority of the seats, produces an unconstitutional dilution or invidious discrimination with respect to the rights of suffrage of the eligible voters living in the more populous political subdivisions, in which may be found 76% of the population of the State. Alternatively, they argued that if population may be completely disregarded as a basis for representation in the Maryland State Senate, then the representation in the

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[20] App. A, p. 46. The majority opinion suggests that the decisions contrary to theirs may be explained on the basis that State constitutional provisions were violated in those instances (App. A, p. 46). This could not serve as a basis of distinction. It is elementary that a violation of a State constitutional provision neither necessarily establishes nor adds to a violation of the Federal Constitution. *Snowden* v. *Hughes*, 321 U.S. 1, 11.

General Assembly as a whole now afforded the residents of the more populous subdivisions creates a dilution of their voting rights in violation of the equal protection and due process clauses of the Fourteenth Amendment. The Court below has held to the contrary. It did so primarily on the ground that history and geography preserve the present representation in the Maryland State Senate from condemnation as invidious discrimination. For the most part, the majority attempt to support their conclusion by relying on what they regard as an analogy provided by the Federal Constitution. There, the House of Representatives is based exclusively on population, and the Senate on geography, or, more properly, on existence as a State.

Appellants will not belabor the arguments that refute the result reached below. Most of them are set forth in Chief Judge Brune's dissenting opinion, a copy of which is attached to this Statement and found in App. A, pp. 46-61. Suffice it to say that the Federal plan has not been followed in Maryland, at least since 1864, when the City of Baltimore was given three State Senators.[21] The increased Senate representation granted the City of Baltimore was confirmed by the Convention and Constitution of 1867.[22] Baltimore was given another Senator in 1900, when its proportion of the State's population had increased to 43%.[23] Finally, in 1922, the City of Baltimore, then possessing 51% of the State's population, was given two more State Senators.[24]

The justification for each increase in Baltimore's Senate representation was solely the fact of its expanding popula-

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[21] Debates of the Constitutional Convention of the State of Maryland Assembly at the City of Annapolis, Wednesday, April 27, 1864 (Annapolis: R. P. Bayly, 1864).

[22] Debates of the Maryland Constitutional Convention of 1867, compiled by Philip B. Perlman (Baltimore: Hepbron & Hayden, 1923), pp. 297-300.

[23] Bell, The Legislative Process in Maryland (U. of Md., 1958), p. 15.

[24] *Ibid.*

lation. Plainly, and contrary to the Court below, the population factor has been applied four times in the past in affording additional representation in the Maryland State Senate for Baltimore. That historical fact cannot be suppressed or overcome by any vague argument that Baltimore somehow is "unique." If the population principle is to be taken into account as a factor on which representation in a legislative body is based, then surely it must be applied on a rational basis; one urban area cannot be preferred over others merely because it happens to be a seaport of historical renown. This especially must be the case where the additional representation was given in recognition of the arguments advanced that it was its expanding population which entitled the City to increased representation.[25]

It is equally established in another fundamental respect, not discussed by the majority opinion below, that the Federal plan or system has not been adhered to in Maryland. Under the Federal Constitution, representation in the House of Representatives is based exclusively on population, except that each State is entitled to at least one Congressman. At the present time, only 5 out of 436 Congressional seats, or approximately 1%, fail to meet the minimum average population requirement. In Maryland, at least 33 additional seats, out of a total of 143 in the House of Delegates, or 23%, are allotted to the less populous subdivisions even though, were minimum population ratio requirements to be applied, the rural counties so favored would not be entitled to any of these 33 seats. Even with the temporary, stopgap legislation enacted at the May, 1962 special session of the Maryland General Assembly [26], it is indisputable that

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[25] See, e.g., *Baltimore Morning Sun*, Feb. 16, 1900, p. 4; *Baltimore Morning Sun*, March 16, 1920, p. 1.

[26] As previously noted, Art. 40, Sec. 42 of the Code of Md. (1962 Supp.) expires on January 1, 1966, unless supplanted by an amendment to the Maryland Constitution prior to that date.

representation in the lower House is not based on population, or even comes very close to being exclusively predicated on such a basis. The special legislation did not provide any population formula; it authorized only a specific increase in Delegate seats for certain counties and legislative districts Art. 40, Sec. 42, Code of Md. (1962 Supp.). Too plainly for argument, the Maryland House of Delegates still falls far short of a chamber in which representation is based on population.

Therefore, even if it could be fairly argued that the existence of a true Federal plan of representation in a unitary, non-Federal State satisfies the demands of the Fourteenth Amendment, that argument cannot be made with respect to Maryland, where nothing resembling a Federal plan has been followed since at least 1864. The argument which has been accepted by the Court below must of necessity be restated as the sophistical proposition that any bicameral arrangement in a State legislature, under which population is taken into some account in one chamber thereof, while in the other it is completely disregarded or applied on a capricious basis, constitutes a sufficient analogy to the Federal plan as to escape constitutional condemnation as invidious discrimination. If the analogy, thus pared down, suffices, and the proposition which the Maryland Court of Appeals has accepted as the law of this case prevails, then this Court's decision in *Baker* v. *Carr* was truly an exercise in futility. However, until the Court indicates that this is all that *Baker* represented, appellants will refuse to believe that the gross malapportionment of representation which now exists in the Maryland State Senate in particular, and in the Maryland General Assembly as a whole, complies with what the Fourteenth Amendment demands.

Since they do not believe it is necessary to deal with an issue which cannot fairly be said to exist in this case,

appellants shall not now state the many reasons why the alleged analogy of a Federal plan, even if such a plan actually had been observed historically in Maryland and was now the basis of representation in the General Assembly, would not save the existing representation provided for in the Maryland State Senate from censure under the Fourteenth Amendment. Chief Judge Brune's dissenting opinion deals extensively and, we believe, persuasively, with the several reasons why a Federal plan does not necessarily provide the equal protection guaranteed citizens against the States by virtue of Section 1 of the Fourteenth Amendment. In addition, a cogent, comprehensive, and completely dispositive answer to the argument based on the alleged precedent of the Federal plan may be found in Professor McKay's recent article, *Reapportionment and the Federal Analogy* (Nat'l. Munic. League: August, 1962). In brief, appellants will only note that while Article 1 of the Federal Constitution expressly guarantees inequality of the representative value of a citizen's vote, so far as concerns representation of sovereign States in the United States Senate, the Fourteenth Amendment, on the other hand, as interpreted by decisions of this Court, guarantees almost precisely the opposite with respect to the representation of non-sovereign counties, municipalities or legislative districts in State legislatures.

Finally, appellants do not think that it can be successfully maintained that one house of a State legislature must comply with the Fourteenth Amendment, while the other need not. An unreasonable dilution of a citizen's vote in either or in both chambers of a legislative body effectively frustrates the legislative process, giving rise to the invidious discrimination in rights of suffrage prohibited by the Fourteenth Amendment, and adverted to in the clearest terms by this Court in *Baker* v. *Carr*, 369 U.S. 186, 208. The Mary-

land Court of Appeals has erred in holding to the contrary, and on the basis of a rationalization which neither past history nor present logic can support.

D. *Only Judicial Relief Can Assure Legislative Reapportionment.* One of the major assumptions which apparently deterred this Court from 1946 to 1962 from entering into what one former Justice labeled "the political thicket" of reapportionment was the notion that the judiciary was ill equipped to fashion effective relief against gross malapportionment. This misassumption, in turn, seems to have arisen out of an apprehension that the decisions and orders of courts in the area of legislative reapportionment might be ignored, circumvented, or even defied, by the legslatures involved. *Colgrove* v. *Green*, 328 U.S. 549, 553. These reservations have proven unfounded. Even prior to this Court's landmark decision in *Baker* v. *Carr*, 369 U.S. 186, court decisions in Michigan, Minnesota, Hawaii and New Jersey which voided existing malapportionment, or asserted jurisdiction to do so, were promptly followed by legislative action reapportioning representation.[37] Moreover, on at least four occasions prior to *Baker* v. *Carr*, Federal court orders had successfully required States to elect their Congressional delegations at large, a burden which induced prompt and more equitable redistricting. *Lewis, Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1087 (1958).

Events occurring subsequent to *Baker* v. *Carr* confirm that any apprehensions that reapportionment decisions by the courts would be followed by legislative evasion or de-

[37] *Giddings* v. *Blacker*, 93 Mich. 1, 52 N.W. 944, 16 L.R.A. 402; *Magraw* v. *Donovan*, 159 F. Supp. 901, 163 F. Supp. 184, 177 F. Supp. 803 (D. Minn., 1958); *Dyer* v. *Kazuhisa Abe*, 138 F. Supp. 220 (D. Hawaii, 1956); *Asbury Park Press, Inc.* v. *J. Russell Woolley*, 33 N.J. 1, 161 A. 2d 705, and see also, *New York Times*, February 2, 1961, pp. 1, 16.

fiance of such rulings were groundless. The Maryland experience, of course, provides the closest and perhaps most compelling case in point. Despite some irresponsible oratorical excursions at the May 25-31, 1962 special session of the Maryland legislature,[28] in the end, the rural legislators, constituting a majority of the Maryland General Assembly, joined in passing a reapportionment measure to take the place of the constitutional provision (Art. III, Sec. 5) which the trial court had struck down as being in violation of the Fourteenth Amendment.[29] The experience of other states has been much the same. Decisions of Federal courts, either voiding reapportionment legislation or asserting jurisdiction, in the States of Alabama,[30] Delaware,[31] Georgia,[32] Florida,[33] Tennessee,[34] and Wisconsin, all were followed by the passage of some reapportionment legislation on the part of the State legislatures concerned, even though, in the case of Wisconsin, the proposed legislation was vetoed by the Governor on the grounds that it was not enough.[35] In the elections scheduled for November, 1962, reapportionment referenda are on the ballot in ten states. *Washington Post & Times Herald*, October 15, 1962, p. A13.

On the other hand, while recent experience demonstrates that court rulings in the field of reapportionment will be honored, however reluctantly, by the legislative bodies

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[28] *Washington Evening Star*, May 29, 1962, p. A1; *Baltimore Morning Sun*, May 30, 1962, p. 36.

[29] *Washington Post & Times Herald*, June 1, 1962, p. A1.

[30] *New York Times*, July 14, 1962, p. 8.

[31] *Washington Post & Times Herald*, August 5, 1962, p. A7.

[32] *Toombs* v. *Fortson*, —— F. Supp. —— (N.D. Ga., September 5, 1962); *Washington Post & Times Herald*, October 14, 1962, p. A6.

[33] *New York Times*, August 13, 1962, p. 18C.

[34] *Baker* v. *Carr*, —— F. Supp. —— (M.D. Tenn., 1962).

[35] *New York Times*, July 21, 1962, p. 32M; *New York Times*, July 3, 1962, p. 1.

which they affect, it is equally established that in the absence of a controlling court decision, it is absolutely futile to anticipate that a legislature will reapportion itself in an equitable manner. A long time ago, a State court perceptively observed that it "would be idle and futile to . . . [seek relief from malapportionment through] . . . the voluntary action of the body that made it." *State* v. *Cunningham*, 81 Wisc. 440, 483, 51 N.W. 724. The representatives from the less populous areas have too great an advantage to relinquish voluntarily their unnatural position of political preference in the absence of any binding court determination holding that it is unconstitutional for them not to do so.[36]

The long history of futile attempts to reapportion the Maryland General Assembly prior to the decision of this Court in *Baker* v. *Carr*, *supra*, quickly followed by the first decision in this case by the Court of Appeals for Maryland and the trial court's determination of May 28, 1962 voiding representation in the House of Delegates, is additional and, we believe, convincing evidence that, the nature of man, the politician, being what it is, legislative reapportioning cannot reasonably be expected in the absence of a controlling and authoritative judicial decision making it clear that existing representation violates constitutional rights, but can be expected in the wake of such a decision. In contrast to the issue resolved in the school segregation decisions announced by this Court in 1954, in *Brown* v. *Board of Education*, 347 U.S. 483, legislative malapportionment is not a subject that has deep and almost unbreakable roots in the culture of a large segment of the American society.

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[36] *Short, States That Have Not Met Their Constitutional Requirements*, 17 Law and Contemp. Probs., 377, 381 (1952); *Schumacher, Reapportionment in Oregon*, 3 W. Pol. Q., 428 (1950).

Primarily, if not exclusively, it is only the rural legislators, not their less self-interested constituents, who can be expected to protest until the ultimate outcome. Unlike some of the difficult experiences which have accompanied lower court attempts to implement the school segregation decisions of this Court, there is absolutely no reason to expect, certainly not in Maryland, that an authoritative ruling of this Court, followed by implementing decrees of the Maryland Courts, will not be sufficient to induce the General Assembly of Maryland to perform its long neglected constitutional duty and to eliminate the invidious discrimination in rights of suffrage which is the direct consequence of the gross malapportionment which prevails in the Maryland State Senate in particular, as well as in the General Assembly as a whole. This Court, therefore, should not be deterred by any alleged lack of either equity or the capacity to fashion effective relief in the premises from granting this appeal and ultimately reversing the decision below.

Conclusion

For the reasons set forth above, this Court has jurisdiction of the appeal and the questions presented are substantial. Consequently, probable jurisdiction should be noted and this appeal set down for briefing and oral argument on the merits. Appellants also respectfully request that, should this Court note probable jurisdiction in the pending appeals filed in *WMCA, Inc.* v. *Simon*, No. 460, October Term, 1962, and in *Reynolds* v. *Sims*, No. 508, October Term, 1962, or grant the petition for certiorari which has been filed in *Beadle* v. *Scholle*, No. 517, October Term, 1962, the instant appeal be consolidated with those three cases, and all heard together by the Court, inasmuch as

they present analogous and important questions under the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted,

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.
JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.
JOHNSON BOWIE,
County Office Building,
Towson, Maryland.
Attorneys for the Appellants.

SHEA & GARDNER,
734 15th Street, N.W.
Washington 5, D. C.
Of Counsel.

October 24, 1962.

APPENDIX A

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially assigned), JJ.

OPINION by HENDERSON, J.; BRUNE, C. J., PRESCOTT and MARBURY, JJ, dissent

Filed: September 25, 1962.

On July 23, 1962, we filed a per curiam order affirming a declaratory decree of the Circuit Court for Anne Arundel County that Article III, sec. 2 of the Maryland Constitution is valid and constitutional. We now state the reasons for our order.

This is the third time this case has been before this Court. On April 24, 1962, following the Supreme Court's ruling in *Baker* v. *Carr*, 369 U.S. 186, and its per curiam order in *Scholle* v. *Hare*, 369 U.S. 420, we reversed a decision of the Circuit Court for Anne Arundel County which had sustained the appellees' demurrers to the bill of complaint. We held, by a divided court, that the bill, alleging that the apportionment prescribed by the Maryland Constitution violated the Fourteenth Amendment to the United States Constitution, stated a justiciable cause of action cognizable in the State courts, and remanded the case in order that the chancellor might determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses." *Md. Committee* v. *Tawes*,

228 Md. 412, 436. We also said that "inquiry into the rational basis for such apportionment seems to be called for."

On May 28, 1962, the chancellor, after argument but without hearing testimony, held on motion for summary judgment that the composition of the House of Delegates, prescribed by Article III, sec. 5 of the Maryland Constitution, violated the Fourteenth Amendment, in that the distribution of numerical voting strength in voting for members of the House of Delegates, accorded to voters in the four suburban and more populous counties, was arbitrary and unreasonable. He reserved decision as to the Senate.

The Governor promptly convened a special session of the General Assembly, which for the first time in the history of this State added nineteen Delegates to the House of Delegates, to be voted for in the 1962 elections, by "stop-gap" legislation rather than by proposing a constitutional amendment. A proposed constitutional amendment failed of passage. The appellants entered an appeal from the chancellor's order reserving decision as to the Senate and we remanded the case with directions that the chancellor decide the point. The present appeal is from that decision. No question is presented as to the validity of the "stop-gap" legislation or the reapportionment of the House of Delegates.

Article III, section 1 of the Maryland Constitution provides: "The Legislature shall consist of two distinct branches; a Senate, and a House of Delegates, and shall be styled the General Assembly of Maryland."

Art. III, sec. 2 provides: "The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election."

Throughout the colonial period the upper house consisted of the Governor and Council, appointed by the proprietor, and modeled after the English House of Lords. They also sat as a provincial court and court of appeals from the county courts. See Bond, Court of Appeals of Maryland, p. 4 et seq. See also 1 McMahon, Historical View of the Government of Maryland (1831), p. 148. That they had a certain sectional distribution was fortuitous. While the House of Delegates was selected on a county basis (four from each) the councilors were selected from among the most eminent landowners and office holders, serving at the will of the Governor.[1] In the Constitution of 1776, Art. XV provided for a Senate to be elected by the vote of Delegates elected two from each county and one each from the City of Annapolis and Baltimore Town. At that time there were eight counties on the eastern shore and ten counties on the western shore. These electors were directed to elect six senators from residents of the eastern shore and nine senators from residents of the western shore, "men of the most wisdom, experience and virtue, above twenty-five years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of one thousand pounds current money." See Niles, Maryland Constitutional Law, p. 5. By the amendment proposed by Chapter 197, Acts of 1836, and ratified in 1837, the Senate was reconstituted to consist of one senator from each county (of which there were then twenty by reason of the establishment of Allegany and Carroll Counties) and one from Baltimore City. The method of indirect election by an electoral college was abandoned. This distribution was continued in the Constitution of 1851, and so far as the counties are concerned, was continued in the Constitutions of 1864 and

[1] The last colonial legislature convened on March 23, 1774, and the twelve councilors present were: Benedict Calvert, John Ridout, John Beale Boardley, George Stewart, Daniel of St. Thomas Jenifer, Benjamin Ogle, Philip Thomas Lee, Richard Lee, William Hayward, Daniel Dulany (the Younger), William Fitzhugh and George Plater. Archives of Md. LXIV.

1867, and in subsequent amendments. The last county to be formed, Garrett, was erected in 1872. See 3 Scharf, History of Maryland, p. 778. From that date the counties have numbered twenty-three.

However, Baltimore City, which had achieved the status of a political subdivision independent of Baltimore County in 1851, was allotted three senators, one from each legislative district, in 1864 and this provision was continued in 1867. It received an additional legislative district and senator in 1900 and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County by Chapter 82 of the Acts of 1918.

The counties of Maryland have always been an integral part of the state government. St. Mary's County was established in 1634 contemporaneous with the establishment of the proprietary government, probably on the model of the English shire, associated with the important office of sheriff. Scharf, *supra*, p. 124 et seq. Indeed, Kent County had been established by Claiborne before the landing of the Marylanders and he established New Kent County in Virginia after he was ousted from Maryland *vi et armis* by the Calverts. We have noted that there were eighteen counties at the time of the adoption of the Constitution of 1776. They have always possessed and retained distinct individualities, possibly because of the diversity of terrain and occupation. Baltimore County, the most populous in the State, still has no incorporated towns, and until the recent adoption of a charter form of government, was governed by three elected commissioners who exercised the executive functions, while most of the legislative functions were exercised by its representatives in the General Assembly. Baltimore City, having acquired the unique status of an independent political subdivision, has maintained its own local government, subject to control by the General Assembly, since 1867. Only two counties, Montgomery and Baltimore have adopted the charter form of government under Art. XI of the State Constitution. While it is true that the counties are not sovereign bodies, having only the status of municipal corporations, *Howard County*

v. *Matthews*, 146 Md. 553, 561, they have traditionally exercised wide governmental powers in the fields of education, welfare, police, taxation, roads, sanitation, health and the administration of justice, with a minimum of supervision by the State. In the diversity of their interests and their local autonomy, they are quite analogous to the states, in relation to the United States.

It is an interesting historical fact that the mode of selecting the members of the United States Senate adopted in 1789 was modeled, to a considerable extent, upon the Maryland Senate of 1776. In addressing the Constitutional Convention on August 145, 1787, Madison opposed a proposal that senators be paid by the states on the ground that it would tend to impair the stability and independence of the Senate, which, he remarked, "was formed on the model of that of Maryland." 4 The Writings of James Madison, edited by Caillard Hunt, G. B. Putnam's Sons (1903) p. 202. Again, in No. 63 of The Federalist Papers, Madison in answering a contention that a Senate appointed not immediately by the people, and for a term of six years, would acquire a dangerous preeminence in the government and finally transform it into a tyrannical aristocracy, stated that "the constitution of Maryland furnishes the most apposite example. The senate of that State is elected, as the Federal Senate will be, indirectly by the people, and for a term less by one year only, * * *. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the senate of Maryland; but no such symptoms have appeared. On the contrary * * * the Maryland constitution is daily deriving from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union." The members of the Federal Senate continued to be elected by the state legislatures until th adoption of the Seventeenth Amendment in 1913. It is also interesting to note that when Maryland abandoned the selection of state senators by an electoral college in 1837, it adopted a provision for one senator from

each county and from Baltimore City, following the federal pattern of geographical representation in the upper house.

The question before is not whether such a provision is wise or unwise but simply whether, as alleged in the bill, membership in both houses of a bicameral legislature must "be based on, or reasonably related to, the present population" of the various political subdivisions of the State. Since the provision of one senator from each county has been repeatedly approved and incorporated in the Maryland Constitution by the people of Maryland, it cannot conceivably offend the Maryland Constitution. The sole claim is that it violates the equal protection clause of the Fourteenth Amendment.

Equal protection has been judicially equated to a prohibition against invidious discrimination. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489. Not every discrimination is invidious, nor will it be set aside "if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426 and cases cited. We think a complete justification for the election of state senators on a county basis is to be found in the historical precedents cited above. The idea of a bicameral legislature, with the upper branch selected on a territorial rather than a popular basis, was a familiar one in 1837 and it is familiar today. The very purpose of having two houses was that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation. A different method of selection was essential to the bicameral plan. No more natural or logical basis could be suggested than that the viable and long established political subdivisions be accorded representation, as they had been in election of electors under the Constitution of 1776.

The bicameral concept is not one that has become obsolete with the passage of the years. It has been repeatedly recognized by Congress and the President, subsequent to the adoption of the Fourteenth Amendment, in approving the constitutions of states seeking admission to the Union. See *Coyle* v. *Smith*, 221 U.S. 559. In the most recent cases, Alaska and Hawaii, their Constitutions each contain pro-

visions for senatorial districts of marked inequality in popular representation. In Alaska one of the senators represents more than fifteen times as many voters as the other. Moreover, the constitutions of a majority of the states that ratified the Fourteenth Amendment contained provisions for an upper house based on a geographical distribution of senators, without reference to population. It can hardly be maintained that in voting for ratification they were, in effect, voting to invalidate their own state constitutions.

The appellants argue that the Federal Constitution furnishes neither analogy nor precedent for the composition of the Maryland Senate, on the ground that the states which adopted the Federal Constitution were sovereign bodies. The argument overlooks the fact that thirty-seven states were admitted to the Union after 1789, which were not and had never been sovereign bodies, with the possible exception of Texas. It also overlooks the fact that it was never suggested that senators vote by states. They were clearly members of a national congress, designed for the very purpose of achieving a greater stability and a stronger central government than under the Articles of Confederation. In any event, the consequence and effect upon voting rights are the same, whether the voter be voting for United States senator or state senator. We think it is hardly conceivable that a different principle would apply in the one case than in the other.

We are of course aware that the government of the United States, within its delegated powers, may possess rights not retained by the states. But where civil rights are concerned there is still truth in the ancient adage that what is sauce for the goose is sauce for the gander. When the Supreme Court held in *Brown* v. *Board of Education*, 347 U.S. 483, that the equal protection clause prohibited the states from maintaining racially segregated schools, it also held in *Bolling* v. *Sharpe*, 347 U.S. 497, decided the same day, that the Federal Government was likewise barred by the Fifth Amendment. The relation between the two amendments seems sufficiently close to negative a conclusion

that a provision like that for the Federal Senate, U.S. Const., Art. I, sec. 3, would be offensive to either.

The appellants argue, however, that the federal plan has not been followed in Maryland, since an exception has been made in the case of Baltimore City, which has been subdivided into six election districts and now has six senators. The argument proves too much. The fact that the original plan has been modified in one instance does not require that it be totally abandoned. There are reasons for a distinction. In 1864, when Baltimore City acquired three senators, the State was in the control of the Union Army and many of the southern sympathizers in southern Maryland and the eastern shore had been disfranchised. There were special reasons for the continuance of extra representation in 1867, in 1900, and again in 1920, when the population of Baltimore comprised fifty-one per cent of the population of the State. Baltimore, even prior to the Civil War, was a great seaport, an industrial center and the hub of commerce and communication. Despite the distrust for city governments, dominated around the turn of the century by "rings" and "bossism," it mustered enough political power to enlarge its representation. Until quite recently it has been under-represented in the House of Delegates as well as in the Senate, although the picture has changed with the population explosion in the suburban counties, and it is not far out of line. The instant case is a contest for political power between the larger and the smaller counties, and Baltimore City is not concerned. It may also be noted that there is no constitutional requirement of territorial uniformity under the Fourteenth Amendment. *Salsbury v. Maryland*, 346 U.S. 545; *Ocampo v. United States*, 234 U.S. 91.

We find nothing in the Supreme Court cases to support the appellants' claim of invalidity in the apportionment of the Maryland Senate. *Baker v. Carr, supra*, merely decided that a justiciable question was presented. The remand in *Scholle v. Hare, supra*, was for the express purpose of allowing the Michigan Court to give further consideration to the question presented in the light of *Baker v. Carr*. We

do not read into that remand any intimation as to how the case should be decided on the merits. Nor do we attach any significance to the similar remand in the New York case of *W.M.C.A., Inc.* v. *Simon*, 370 U.S. 190. Upon remand, the Michigan Court, by a vote of four to three, held that in "[t]he absence of any semblance of design or plan in the present senatorial districts," the state constitutional provision approved by the voters in 1952, was invalid. But Mr. Justice Stewart stayed the order for reapportionment, stating: "It is very clear the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker* v. *Carr*." We think it is significant that Mr. Justice Stewart, concurring in the *Baker* case, said: "The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' * * *.

"In *MacDougall* v. *Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former.' * * *." We find no intimation in later Supreme Court cases that this is not still the law.

We think there is little to be gained from a review of cases in other states and in the lower federal courts. A typical statement is that of the Tennessee Court upon remand of *Baker* v. *Carr*. 31 L.W. 2003 (June 22, 1962): "[E]qual protection requires that * * * apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor." See also *Sims* v. *Frink*, 30 L.W. 2512 (Ala.), *Toombs* v. *Fortson*, 30 L.W. 2605 (Ga.) (May 25, 1962) and *Caesar* v. *Williams*, 371 P.2d 241 (Ida.) rehearing denied May 8, 1962. In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses,

as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all. Such cases are readily distinguishable. In any event, there is no unanimity of opinion to be drawn from the cases, and the final determination must await further light from the Supreme Court of the United States.

IN THE COURT OF APPEALS OF MARYLAND

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SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (Specially Assigned), JJ.

Dissenting Opinion by BRUNE, C. J., in which PRESCOTT and MARBURY, JJ. concur.

Filed: September 25, 1962.

BRUNE, C. J., with whom PRESCOTT and MARBURY, JJ. join, dissenting:[1]

The question on this appeal is fundamentally one of Federal constitutional law—the meaning and application of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States with regard to the apportionment of representation in the legislature of a State. That was also true on the first appeal, but the question as then presented was two-pronged and related to the

[1] But for the recent (and fortunately temporary) illness of Judge Prescott, who wrote the majority opinion on the first appeal in this case, this opinion would have been written by him.

apportionment of representation (a) in the House of Delegates and (b) in the Senate of the General Assembly of Maryland. As a result of legislation enacted after the first appeal, the present controversy is limited to the apportionment of representation in the State Senate. The trial court determined, following a second remand of the case, that if the House were properly apportioned (as he thought it had been by the Special Session of the General Assembly following the determination just prior to the Special Session that its then existing apportionment would not be sustainable as to the 1962 election), there was no need to reapportion representation in the Senate on any basis of population. He based his conclusion upon an analogy to the Federal system under which the House of Representatives is apportioned on the basis of population, but each of the States, regardless of population, has two members of the Senate. He accordingly dismissed the bill as to reapportionment of the Senate. By a per curiam order joined in by four of the seven judges this Court affirmed the order of dismissal. We dissented.

In the majority opinion on the first appeal, *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 412, 180 A. 2d 656, we stated some familiar propositions which are equally apposite here: that the Constitution of the United States and laws made in pursuance thereof are parts of the supreme law of the land and are paramount to any contrary provisions of the Constitution or laws of this State, that this is so both under the Supremacy Clause of the Constitution of the United States and under Article 2 of the Maryland Declaration of Rights, the latter in effect writing into our State Constitution this limitation upon everything else therein expressed; and that interpretations of the Constitution of the United States by the Supreme Court of the United States are binding upon us. We believe that there is no dispute or difference between the members of this Court on those propositions. The last of them was recognized by the majority opinion on the first appeal (228 Md., at 418 and 428) and also by the dissenting opinion (228 Md., at 448). Our difference with the present majority is based upon our understanding of the effect of recent

decisions of the Supreme Court bearing upon the subject in hand.

The first of those cases is, of course, *Baker* v. *Carr*, 369 U. S. 186. It makes clear, we think, that the Equal Protection Clause of the Fourteenth Amendment does afford protection against the debasement or dilution of voting rights through State legislative apportionment of representation. The exact point at which such protection will be afforded in any specific case, it is true, is not determined in *Baker* v. *Carr*; nor, we think, could it well have been. The basis of the claim of the plaintiffs-appellants was discrimination through the debasement or dilution of their voting rights through the apportionment of representation in the Tennessee Legislature (both houses) without regard to population. The second proposition determined by the Supreme Court is thus stated (369 U.S., at 197-98, 82 S. Ct., at 699): "(b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief." And near the end of the opinion of the Court Mr. Justice Brennan further said (369 U.S., at 237, 82 S. Ct. at 720): "We conclude that the complaint's allegations of a denial of equal protection present a justiciable constitutional cause of action upon which appellants are entitled to a trial and a decision. The right asserted is within the reach of judicial protection under the Fourteenth Amendment."

We think it also clear both from what we have just quoted and from footnote 15 to the opinion of the Court in *Baker* that the right for which the appellants were entitled to seek protection and which might be found upon trial of the merits, to have been violated was a Federal constitutional right. Footnote 15 (369 U.S., at 195, 82 S. Ct., at 698) reads in part as follows: "The complaint, in addition to the claims under the Federal Constitution, also alleges rights and the General Assembly's duties, under the Tennessee Constitution. Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution

which go further than the protections of the Fourteenth Amendment."

The majority opinion in the instant case appears to take a different view and to confuse the remedy with the right. In the last paragraph of the majority opinion cases in other States and in the lower Federal courts are dismissed with the comment that "there is little to be gained from a review of [such] cases." The opinion cites several of them decided since *Baker* and then goes on to say:

> "In reading some of the decisions attention must be paid to whether the particular constitution requires representation based on population in both houses, as some do. The action taken by state or lower federal courts, once the question of justiciability is conceded, may turn on the construction of the state constitution and not present a federal question at all."

Where compliance with State constitutional requirements will also vindicate the Federal right shown to have been infringed, a decree in accordance with State constitutional provisions is an obviously desirable form of remedy and the otherwise possibly very difficult problem of determining an appropriate remedy (a problem not solved by *Baker*) may become relatively simple. However, it remains clear under *Baker* that a Federal right exists quite independent of State constitutional provisions and is in no way dependent upon them for its enforcement through some appropriate remedy.

The second recent Supreme Court case which seems to us highly pertinent to the present controversy is *Scholle* v. *Hare*, 369 U. S. 429. That case involves an attack solely on the apportionment of the Michigan Senate. The Michigan House is apportioned about as closely as may be on a basis of population. This fact was certainly well known to the Supreme Court of the United States when it remanded the *Scholle* case to the Supreme Court of Michigan for further consideration in the light of *Baker* v. *Carr*, *supra*. It is difficult for us to imagine a clearer indication (short of an express statement) than is given by this remand that the mere fact that one house of a State legislature is ap-

portioned strictly in accordance with population does not immunize the apportionment of the other from attack under the Fourteenth Amendment on the ground that gross malapportionment of representation as regards population constitutes invidious discrimination.

In the majority opinion of this Court on the first appeal in this case we expressed the views (228 Md., at 433-34) that no precise and inflexible formula for representation is required or can be stated, that the State is allowed every reasonable latitude with regard thereto and that any discrimination which may exist therein will not be set aside if any state of facts reasonably may be conceived to justify it, and that "there is a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We adhere to those views and we think the remand of the *Scholle* case supports them. The remand of that case appears to us to have been for the purpose of having the Michigan Court determine whether or not there was a rational ground upon which to support the allocation of representation in the Michigan Senate, which rather clearly involved marked disparities in voting power between different senatorial districts as regards population. The maximum disparity in Michigan, we note, was approximately 15 to 1 as against a maximum disparity in Maryland of approximately 32 to 1. We think that the remand of the case of *W.M.C.A.* v. *Simon*, 370 U.S. 190, 82 S. Ct. 1234, for the court below (the United States District Court for the Southern District of New York) to be "the first to consider the merits of the federal constitutional claim, free from any doubts as to its justiciability and as to the merits of alleged arbitrary and invidious geographical discrimination" supports our interpretation of the purpose of the remand of the *Scholle* case. As we read the opinions filed in the Michigan Supreme Court following remand, the Court divided sharply on whether there was or was not a rational basis for the Michigan senatorial apportionment fixed by a constitutional amendment adopted in that State in 1952.

In at least one respect, which may be of some significance, the Michigan case differs from the situation in Maryland. There, at the same election at which the apportionment under attack in *Scholle* was adopted by a popular majority of approximately 300,000 votes, another proposed constitutional amendment which would have apportioned the Senate on the basis of population was defeated by a popular majority of approximately 500,000 votes.[2] No similar choice has ever been submitted to popular vote in Maryland. Despite this popular vote and against historical-geographical arguments and the analogy to the Federal system, a majority of four out of the seven members of the Michigan Supreme Court participating held the 1952 apportionment invalid. The case is now on appeal to the Supreme Court and the order of the Supreme Court of Michigan has been stayed by Mr. Justice Stewart.

The majority of this Court in the present case seems to accept tacitly, if not expressly, the view that if one house of the Maryland General Assembly (the Senate) may be apportioned on a basis which ignores disparities of population, the other house (the House of Delegates) must be apportioned with due regard to population, and assumes that the House of Delegates now is so apportioned. It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us. It is also true, however, that even as reapportioned by the May 1962 Special Session of the General Assembly, considerable disparities still exist in a number of instances, though previous disparities have been materially reduced. Reference to Appendix A appended hereto will show the past and present situations with regard to the House and also the situation with regard to the Senate, which has not changed. There is no such close relationship between population and representation as in the case of the Michigan House, or between registered voters and representation as is declared necessary by the Federal District Court in Ten-

[2] Cf. *W.M.C.A. v. Simon* on remand, 31 L.W. 2121, where a somewhat similar factor was one of several grounds upon which the existing New York apportionment was upheld.

nessee after remand of the *Baker* case. (31 L.W. 2003.). Surely, the present Maryland apportionment is not so closely related to population as is that of the House of Representatives of the Congress of the United States, In that respect the Federal analogy is far from perfect.

Nor is it perfect in other respects. We still believe that there is some difference between the relationship of the States and the National Government and that of the counties and the State Government. We do not deny that State sovereignty is not what it once was and is far less significent today than it was in 1787 or 1789. It is true, however, that the Constitution of the United States does offer the States with small populations (no matter when they may have become members of the Union) a guarantee against being deprived of equal representation in the Senate without their consent. Counties, at least in Maryland, remain creatures of the State and they have no such constitutional guarantee.

Also, we think that the appellants are right in contending that Maryland does not fully follow the Federal pattern in another respect. The majority attempts to minimize the departure from the rule of one senator per political subdivision made in the case of Baltimore City. With all due deference to our brothers' reading of local history, the fact seems to stand out that these concessions to Baltimore City were granted, albeit grudgingly, in recognition of Baltimore's relatively large population and economic importance. There is no corresponding provision in the Federal Constitution.

Strictly, as a matter of history, the pattern of one senator per county or comparable political subdivision was in force only from 1851 to 1864. From 1837 to 1851 Baltimore City, which was a part of Baltimore County, had one senator. Since 1864 it has had first three, later four, and since 1922, six. At the time of the last increase it had slightly over 50% of the population of the State, according to the 1920 census, with 6 senators out of 29 it had about 21% of the representation in the Senate. It seems hardly necessary to point out that none of the six legislative districts comprised in the City of Baltimore con-

stitutes a political subdivision of the State comparable to a county.

The majority attempts to bolster the Federal analogy by the argument that those who drafted the Fifth Amendment (many of whom had also participated in drafting the original Constitution) could not have thought that Due Process of Law guaranteed by the Fifth Amendment was infringed by the Equal Representation Clause applicable to the Senate, and then by first equating Due Process under the Fifth Amendment with Due Process under the Fourteenth (this equation being, we think, true) and by then further equating the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment. This argument seems to us highly strained. We know of no basis, historical or otherwise, for thinking that the provision for the equal representation of the States in the Senate—a representation of which no State may be deprived without its consent—was or was intended to be amended, limited, or construed by the Fifth Amendment. We may further note that, although in many instances the Due Process and Equal Protection Clauses may overlap, these two Clauses are separately expressed in the Fourteenth Amendment and that they constitute limitations upon the States, not upon the Federal Government. A further, and we think in itself sufficient, answer to this contention is that *Baker* v. *Carr*, *supra*, rests squarely and expressly on the Equal Protection Clause and is the basis for the remand of *Scholle*.

The imperfections of the analogy to the Federal system are a relatively minor factor in the case, though the analogy itself is one of the main grounds upon which the majority relies. The other ground—and perhaps it really includes the Federal analogy ground—is that history furnishes a rational basis for geographical representation without regard to present glaring disparities in population between areas.

Up to a point, which it may be difficult to locate precisely, there is doubtless some merit to an argument based solely on history, but there must be a limit to its efficacy. A phrase with which all lawyers are familiar is the old

saying that the reason for something is historical rather than logical. How far can we go in adopting history as the guide for determining whether there is a rational basis for a patent discrimination? It is almost ironic that this malapportionment of representation to population in this case was (as well as is) worse in the Senate than in the House. Surely, the historical-geographical argument cannot be pushed to the logical extreme of contending that an uninhabited geographical area is entitled to representation in a legislative body. (We need not even stop to consider the problem of who would represent it.) Geography simply cannot be divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other such subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed. A disparity of 32 to 1, we think, does exceed the permissible limit. In votes for the election of Senators that disparity exists as between voters in Baltimore County and voters in Kent County. If there were no other comparable disparities, it might be of little significance; but there are other comparable disparities, as reference to the figures in Appendix A will show. Thus the disparity as between voters in Prince George's County and in Talbot County is approximately 16½ to 1, as between voters in Montgomery County and in Garrett County it is approximately 17½ to 1, and as between voters in Anne Arundel County and Queen Anne's County it is approximately 12½ to 1. The maximum disparity in *Scholle* was 15 to 1. Without multiplying comparisons of one county with another, the following composite figures (taken from Appendix B), in which representation in the Senate is divided roughly into thirds, will reveal the general disparity between the most populous subdivisions of the State and the less populous subdivisions:

Units	1960 Population	Approximate % of State Population	Approximate % of Senate
Four most populous Counties and Baltimore City (10 Senators)	2,336,409	75	34½
Ten least populous Counties (10 Senators)	214,930	7	34½
Nine intermediate Counties (9 Senators)	549,350	18	31

To carry comparisons a step further, the fifteen least populous counties can elect 15 of the 29 Senators. These 15 counties have a combined population of 450,160, or a little over 14% of the State's total population of 3,100,869. That is, approximately one-seventh of the population can elect a majority of the State Senate.

Further comment can scarcely add emphasis to the figures shown in the above table and in the paragraph immediately following it.

The supposed Federal analogy was at least as well known to the Supreme Court as to us, but it did not prevent remand for consideration on the merits of apportionment in the State Senate in *Baker*, in *Scholle*, or in *W.M.C.A.* We cannot think of any logical reason for remanding a case to a lower court for the consideration of a patently untenable ground of constitutional attack. Of the three cases just cited *Scholle* seems most pertinent on this matter. The majority opinion in the instant case seeks to avoid what we think is a necessary implication from the remand of *Scholle* on this point by saying that the Supreme Court did not decide the question. We think that what the Supreme Court has not decided is whether or not there is a rational basis for the Michigan senatorial apportionment.

We think that the majority of this Court dismisses rather too lightly decisions of the courts of other States or of lower Federal courts from a review of which it finds little to be gained. We think that on the whole these other recent cases seem to support our views rather than those of the majority. In general, they regard both houses of a State legislature as subject to a requirement that there shall be some reasonable relationship between population and rep-

resentation. This may be shown by a rational explanation of a departure from an exact ratio, and such an explanation will be more readily accepted as to one house if the other is exactly proportioned to population. Some, such as *Baker* v. *Carr, supra,* on remand (31 L.W. 2003) have deferred action as to one house if the other is almost exactly apportioned according to population.

The opinion of the United States District Court for the Middle District of Alabama, filed July 21, 1962, in *Sims* v. *Frink,* 205 F. Supp. 245, is carefully reasoned, and, in our estimation, supports the view that even exact, or almost exact, apportionment of one house in a State legislature in accordance with population does not entirely dispense with the need for some reasonable regard for population in the apportionment of the other. To like effect is another very recent Federal District Court decision (July 23, 1962) in the Southern District of Florida, in *Sobel* v. *Adams,* F. Supp. . See, however, the more recent opinion of that court, F. Supp. , also reported in the Miami Herald of September 6, 1962, upholding a proposed Florida constitutional amendment which affects both House and Senate, bringing apportionment of the former much more nearly in line with population, but permitting considerable disparities as to the Senate. It was held that population need not be "a major factor" in reapportionment of the Senate. The Supreme Court of Vermont (on July 20, 1962) in *Mikell* v. *Rousseau,* A. 2d , held the apportionment of the Senate of that State to be unconstitutional. A Kansas County District Court reached a like conclusion with regard to the Kansas legislature on July 27, 1962. A decision of the Court of Common Pleas of Dauphin County, Pennsylvania, cited by the appellees, expresses views in accord with what we regard as the general trend and simply defers action. It does not involve a final determination on the merits. Nor did *Caesar* v. *Williams,* 371 P. 2d 241 (Ida.), decided April 3, 1962, reach a final decision on the merits. In Colorado the State Supreme Court in *Stein* v. *General Assembly,* 31 L.W. 2075, deferred requiring action but a Federal District Court in *Lisco* v. *McNichols,* 31 L.W. 2107, shortened the time of deferment.

The United States District Court for the Middle District

of Tennessee, on remand of *Baker* v. *Carr, supra*, appears to have taken a view similar to ours that there should be an "equitable" basis of reapportionment of the Tennessee Senate, even though it need not be "fully related to voting strength." See also *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D., Ga.), 30 L.W. 2695, in which the District Court held that at least one house would have to be apportioned *strictly* on a population basis and did not decide whether both houses would have to be so apportioned.

A three-judge Federal District Court in Oklahoma has acted to bring about reapportionment of the legislature of that State. *Moss* v. *Burkhart*, F. Supp. , commented on in the "Judicial Highlights" section of the Federal Reporter Advance Sheets for July 9, 1962. Further action in that case (for which we presently have no F. Supp. citation) is reported in *Facts on File*, August 2-8, 1962, to have been taken on August 3, 1962.

In *Sweeney* v. *Notte*, A. 2d (R.I.), 31 L.W. 2060, the Supreme Court of Rhode Island, though holding that it could not take action to enforce its views in a reapportionment case said: "The Attorney General contends, and petitioners concede, that apportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. We are in full accord with such contention, but it is equally true that historical recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one fourth of that enjoyed by others is, in our opinion so unjust as to be invidiously discriminatory."

See also *Sanders* v. *Gray*, 203 F. Supp. 158 (N.D., Ga.), involving the Georgia primary election unit vote rule. Probable jurisdiction has been noted but an application to advance for argument was denied in that case, *sub nom.*, *Gray* v. *Sanders*, 370 U.S. 921, by the Supreme Court. That Court did not adopt the view of Mr. Justice Harlan that leave should be granted the appellants for a stay of the injunction issued by the District Court pending the determination of the appeal.

We also refer to the remarks of two University of Virginia political scientists, Messrs. Paul T. David and Ralph Eisenberg, at the recent annual convention of the American Political Science Association in Washington. They discussed the need for representation with reasonable regard to population in both houses of a state legislature and expressed views thereon, as reported in the Washington Post of September 6, 1962 (pp. 1 and A 8) in general accord with ours.

In the present case we think that the gross disparities which exist in relative voting power (and which are not even disputed, for they cannot be) cast upon the proponents of the existing apportionment the burden of showing a rational basis for such departures from any regard for population as a basis for representation. This burden, in our estimation, has not been met. Such provisions as we have here seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion of political initiative spoken of in *MacDougall* v. *Green*, 335 U.S. 281, at 284. Neither the long continuance of disparities nor the magic phrase "Federal analogy" sems to us to furnish the rational basis for such disparities which is necessary to save them from constituting "invidious discriminations" under the Fourteenth Amendment, as we think that Amendment has been authoritatively interpreted by the Supreme Court in the cases above referred to and recently decided by that Court.

We, therefore, think that the decree of the Circuit Court should have been reversed.

APPENDIX A

Population and Representation in the General Assembly of Maryland

Unit	Population	House of Delegates Prior to 5/31/62 No. of Delegates	House of Delegates Prior to 5/31/62 No. Represented by Each Delegate	House of Delegates After 5/31/62 No. of Delegates	House of Delegates After 5/31/62 No. Represented by Each Delegate	Senate No. of Senators	Relative Values of Votes Per Cent (%) of Value of Vote to Statewide Average For Delegates Prior to 5/31/62	For Delegates After 5/31/62	For Senator
State as a Whole	3,100,689	123	25,210	142	21,837		100	100	100
Allegany	84,169	6	14,028	6	14,028	1	179	156	129
Anne Arundel	206,634	6	34,439	7	29,519	1	73	74	52
Baltimore	492,428	6	82,071	13	37,879	1	31	58	22
Calvert	15,826	2	7,913	2	7,913	1	319	276	675
Caroline	19,462	2	9,731	2	9,731	1	259	224	550
Carroll	52,785	4	13,196	4	13,196	1	491	165	203
Cecil	48,508	3	16,136	3	16,136	1	156	135	221
Charles	32,572	2	16,286	2	16,286	1	155	134	328
Dorchester	29,666	4	7,417	4	7,417	1	340	294	360
Frederick	71,930	6	11,988	6	11,988	1	210	183	149
Garrett	20,420	3	6,807	3	6,807	1	370	321	534
Harford	76,722	4	19,181	4	19,181	1	131	114	139
Howard	36,152	2	18,076	2	18,076	1	139	121	296

APPENDIX A (Continued)

Population and Representation in the General Assembly of Maryland

Unit	Population	House of Delegates Prior to 5/31/62 No. of Delegates	House of Delegates Prior to 5/31/62 No. Represented by Each Delegate	House of Delegates After 5/31/62 No. of Delegates	House of Delegates After 5/31/62 No. Represented by Each Delegate	Senate No. of Senators	Relative Values of Votes Per Cent (%) of Value of Vote to Statewide Average For Delegates Prior to 5/31/62	For Delegates After 5/31/62	For Senator
State as a Whole	3,100,689	123	25,210	142	21,837	29	100	100	100
Kent	15,481	2	7,741	2	7,741	1	325	282	691
Montgomery	340,928	6	56,821	10	34,093	1	44	64	32
Prince George's	357,395	6	59,566	10	35,740	1	42	61	30
Queen Anne's	16,569	2	8,285	2	8,285	1	304	264	644
St. Mary's	38,915	2	19,458	2	19,458	1	129	112	249
Somerset	19,623	3	6,541	3	6,541	1	385	334	545
Talbot	21,578	3	7,193	3	7,193	1	350	308	495
Washington	91,219	6	15,203	6	15,203	1	166	144	117
Wicomico	49,050	4	12,263	4	12,263	1	206	178	218
Worcester	23,733	3	7,911	3	7,911	1	319	276	450
Baltimore City	939,024	36	26,001**	39	24,001**	6	97**	91**	68**

*Average number, statewide, of persons represented by each of 29 Senators, 106,920.
**Citywide average without regard to inequalities between Legislative Districts.

Appendix B

Comparison of Representation in the Senate of Maryland of the City of Baltimore and the Four Most Populous Counties and of Other Counties

	1960 Population	Approximate % of Population of State	No. of Senators	Approximate % of Senate
Group 1				
Baltimore City and Four Most Populous Counties:				
Baltimore City	939,024	30.22	6	20.70
Baltimore County	492,428	15.88	1	3.45
Prince George's County	357,395	11.53	1	3.45
Montgomery County	340,928	10.99	1	3.45
Anne Arundel County	206,634	6.67	1	3.45
	2,336,409	75.29	10	34.50
Group 2				
Ten Least Populous Counties:				
Kent County	15,481	.50	1	3.45
Calvert County	15,826	.51	1	3.45
Queen Anne's County	16,569	.53	1	3.45
Caroline County	19,462	.63	1	3.45
Somerset County	19,623	.63	1	3.45
Garrett County	20,420	.66	1	3.45
Talbot County	21,578	.70	1	3.45
Worcester County	23,733	.77	1	3.45
Dorchester County	29,666	.96	1	3.45
Charles County	32,572	1.05	1	3.45
	214,930	6.94	10	34.50
Group 3				
9 Intermediate Population Counties:				
Howard County	36,852	1.17	1	3.45
St. Mary's County	38,915	1.26	1	3.45
Cecil County	48,408	1.56	1	3.45
Wicomico County	49,050	1.58	1	3.45
Carroll County	52,785	1.70	1	3.45
Frederick County	71,930	2.32	1	3.45
Harford County	76,722	2.48	1	3.45
Allegany County	84,169	2.71	1	3.45
Washington County	91,219	2.94	1	3.45
	549,350	17.72	9	31.05

IN THE COURT OF APPEALS OF MARYLAND

No. 140—Adv.

SEPTEMBER TERM, 1962

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

Brune, C. J., Henderson, Hammond, Prescott, Horney, Marbury, Macgill, James (specially assigned), JJ.

Dissenting Opinion by PRESCOTT and MARBURY, JJ.

Filed: September 25th, 1962.

PRESCOTT and MARBURY, JJ, separately dissenting:

As indicated therein, we fully concur in the able dissenting opinion of Chief Judge Brune. In addition, we deem it appropriate to call attention to the contrast between the conclusion reached by the present majority and what was said in the majority opinion on the first appeal in which two of the majority on the present appeal concurred.

Plaintiffs' bill of complaint alleges malapportionment in both the State Senate and the House of Delegates. The case first reached us after the trial court sustained demurrers to the bill. We reversed, stating that the Supreme Court had made "a strong implication in the *Baker* decision that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination." We then remanded the case with directions to the chancellor to determine whether representation in either or both Houses of the General Assembly was apportioned on a basis involving such discrimination. The chancellor found that the representation in the House was unconstitutionally malapportioned, but made no finding as to the

Senate. We again remanded for a decision as to the Senate. It is elementary that if the well-pleaded allegations of the bill failed to state a cause of action with reference to representation in the Senate, neither remand insofar as it concerned that branch of the Assembly was proper. Upon the remand no testimony whatever was taken. The defendants filed an answer in which they admitted substantially all of the allegations of the bill relating to malapportionment, but, even though the majority opinion stated what we quoted above, the defendants stated in their answer that "representation in the Maryland Senate need not be based on nor reasonably related to the present population of the Counties and Baltimore City [and the present majority opinion sustains this contention]." Essentially, the case reaches us now in the same posture as the first appeal, the only difference being that in the first appeal the demurrers admitted the well-pleaded allegations of the bill, and in the present appeal the answer admits them with minor and insignificant exceptions. On those facts which were held sufficient on the first appeal to state a cause of action as to the Senate as well as the House, the present majority now finds "nothing in the Supreme Court cases [no case on malapportionment has been decided by the Supreme Court since our first opinion] to support the appellants' claim of invalidity in the apportionment of the Maryland Senate."

APPENDIX B

(Filed May 24, 1962)

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

OPINION

Question Presented

Does the present composition of the State Senate and/or the House of Delegates of Maryland as provided by Article 3, § 2 and 5 of the Maryland Constitution invidiously discriminate against the Petitioners and therefore violate the equal protection clause of the United States Constitution?

How Question Arises

The Bill of Complaint was filed in this Court on August 12th, 1960 by the Maryland Committee for Fair Representation (hereinafter called "Committee") and seven citizens, taxpayers and voters from Montgomery, Anne Arundel, Baltimore and Prince George's Counties (hereinafter called "large" or "suburban" Counties) and Baltimore City against the Governor of Maryland, Board of State Canvassers, Secretary of State, Comptroller of the Treasury, Attorney General, Treasurer, Clerk of the Court of Appeals of Maryland (being members of the State Board of Canvassers) and the Board of Election Supervisors of Anne Arundel County.

Briefly, it is contended that the present system of representation in the Maryland Legislature, whereby the voters of the four (4) suburban Counties and Baltimore City receive representation below that to which they would be

entitled if representation was based on population, whereby their right to vote is diluted in violation of the equal protection and due process clause of the Fourteenth Amendment.

In September, 1960, Demurrers were filed by the Defendants claiming, inter alia, that reapportionment is a political question and as such is not a justiciable controversy but rests with the discretion of the Legislature or the people. The Demurrers were argued on November 12, 1960. On February 21, 1961, this Court, under the then controlling decisions of the United States Supreme Court, dismissed the Bill of Complaint. This decision was duly appealed to the Court of Appeals of Maryland and argued before five of the Judges of that Court on October 17, 1961. On December 12, 1961, the case was re-argued before seven Judges.

On March 26, 1962, the Supreme Court of the United States in a somewhat similar case, arising from Tennessee, overruled the existing law and in extensive and separate Opinions of 96 pages (6 to 2 decision) held that the District Court possessed jurisdiction of the subject and that a justiciable cause of action was stated. (Baker v. Carr, 7 L. ed. 2d 663).

On April 25, 1962, the Court of Appeals of Maryland, following the decision of the Supreme Court, reversed the Decree of this Court, and remanded the cause for further proceedings. Judge Henderson filed a dissenting Opinion in which Judge Horney concurred.

Appellate Opinion

The Majority Opinion of the Maryland Court of Appeals, written by Judge Prescott, settles many questions raised in the Petition so that my present function is somewhat limited and narrow. Among other questions, the Appellate Court decided:

(a) That this Court has the power and duty to determine the important question raised by the Petition:

(b) That it is not possible or advisable to provide a precise and inflexible rule or formula for proper representation in the Legislature:

(c) Maryland Law does not require that representation be based upon a mathematical ratio or population or of eligible voters:

(d) That the tenure and terms of the present members of the General Assembly cannot be changed:

(e) That it would be illegal as suggested by the Petitioners to provide "at large" election of the members of the Legislature.

(f) That the Chancellor should not enjoin anyone at this time, but should retain jurisdiction so that he can grant injunctive relief before the November, 1962 General Election, should the situation then so justify.

(g) That the representation in the Legislature does not violate the Civil Rights Statutes, nor §2, Article XIV of the Maryland Constitution (1950) and Articles 1, 7 and 45 of the Maryland Declaration of Rights.

Chancellor's Hearing

Under the aforesaid Opinion of the Appellate Court, it is my function and duty to receive evidence and determine whether or not an invidious discrimination exists with respect to representation in either or both Houses.

The material allegations of fact in the Bill of Complaint and the exhibits attached thereto were admitted by the Defendants in their Answer. The Defendants denied opinion allegations, conclusions of law and certain inferences. Furthermore, they offered in evidence an official census return (Respondents' Ex. #1); State of Maryland registration figures as of October 1, 1960 (State's Ex. #"A"). State's Election returns for Governor, November 4, 1958 (State's Ex. #B). State Election returns for President of the United States, November 8, 1960 (State's Ex. #"C"). Moreover, in their Answer, Respondents repeatedly state that the combination of the four suburban Counties and Baltimore City create an artificial combination of political subdivisions which is both irrelevant and immaterial, and, in conclusion, request that the Bill of Complaint be dismissed with appropriate costs.

No oral testimony was offered by any of the parties but arguments were made and briefs submitted by the Solicitor

for the Petitioners, the Attorney General and his Deputy on behalf of Governor Tawes and the members of the State Board, Solicitor for the Board of Election Supervisors of Anne Arundel County, and Solicitors on behalf of several amicus curiae. A Motion for Summary Judgment was also filed on behalf of the Petitioners under Maryland Rule 610.

Basic Constitutional and Equitable Principles

1. First and foremost, it must be remembered as explained by Judge Prescott that the provisions of the Federal Constitution as interpreted by the Supreme Court of the United States are conclusive and constitute the Supreme Law of the entire Country. Wherefore, we find the following in both the Federal Constitution (Art. VI, § 2) and the Maryland Constitution (Art. 2, Declaration of Rights):

> "The Constitution of the United States, and the Laws made, or which shall be made, in pursuance thereof, and all Treaties made, or which shall be made, under the authority of the United States, are, and shall be the Supreme Law of the State; and the Judges of this State, and all the People of this State, are, and shall be bound thereby; anything in the Constitution or law of this State to the contrary notwithstanding."

2. That the Judiciary of this State has not only the authority but the duty to declare laws and enactments invalid when they transcend constitutional limits.

3. Every intendment must be resolved in favor of constitutionality and the burden of showing unconstitutionality is on the Petitioners.[1]

4. To declare a section of the State Constitution invalid, as being in violation of the Equal Protection clause of the Fourteenth Amendment, the fact of equality is not enough as the enactment must be arbitrary, unreasonable, oppressive or an unjust discrimination.[2]

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[1] *McGowan* v. *Md.*, 366 U.S. 420-426; *Johns Hopkins University* v. *Williams*, 199 Md. 382, 86 A2 899; *Norris* v. *Baltimore*, 172 Md. 667, 192 A. 531.

[2] *Pope* v. *Williams*, 98 Md. 59 56 A. 543-aff. 193 U.S. 621-48 L. ed. 87; 5 M.L.E., § 231-233 and cases cited therein.

5. History is recognized as a pertinent consideration in the making of a constitutional determination.[3]

6. Geography, to a lesser extent, is also recognized as a pertinent consideration in the making of a constitutional determination.[4]

Composition of State Senate and House of Delegates

With these principles in mind, let us consider whether or not the present composition of the Senate and/or the House of Delegates invidiously discriminates against the Petitioners.

Although different principles may be applied to answer the question regarding the Senate and the House, they should be considered together. This is because a different answer could be made if the Maryland General Assembly were unicameral with one of the compositions instead of bicameral with both compositions.

Counsel during their arguments stated that they knew of no precise formula to determine or define "invidious discrimination" in constitutional issues. Webster's Dictionary defines "invidious" as "tending to excite hatred, ill will or envy; likely to give offense; especially unjustly discriminating or repugnant."

In State of *Oklahoma* v. *Williamson*, 316 U. S. 535, 86 L. ed. 1655, the Supreme Court held that "when the law lays unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made a "discrimination" as invidious as if a particular race or nationality had been selected for oppressive treatment."

In determining whether there is invidious discrimination in this case, I believe that the extent of the disparity is important; also, whether the disparity between the Counties or Legislative Districts has any reasonable justification; whether the action of the State Legislature or the constitutional enactment is unjustly arbitrary and unreasonable,

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[3] Judge Prescott's Opinion, p. 23, citing *Frank* v. *Md.*, 359 U.S. 360 and illuminating footnote No. 11.

[4] Judge Prescott's Opinion, p. 23.

keeping in mind, at the same time, that identity of treatment is not required if the classification or disparity of voting rests on real and not feigned differences.

Justice Smith aptly said in his prevailing Opinion in the famous Michigan decision:[5]

> "The Constitution of the United States does not require, as we construe equal protection, that there be a precise mathematical correlation between the weights accorded votes. It does not demand the precision of a physicist. But it does demand that the voters' right to substantial equality not be subject to gross, or to wilful and deliberate, deprivation, and it is no more palatable to us that it be accomplished on a grand scale than through the petty larceny of the ward healer."

Likewise, Justice Kavanagh, in another prevailing opinion, on page 71, quoted from a Wisconsin case[6] to the effect that perfect exactness in the apportionment, according to number of inhabitants is neither required nor possible but that when the wide departure cannot possibly be justified by the exercise of any judgment or discretion on the part of the Legislature, its action is void.

In *MacDougall* v. *Green*, 335 U. S. 281, 98 L. ed. 3, 7, the Supreme Court in a per curiam Opinion, said:

> "... To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view

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[5] *Scholle* v. *Hare*, 360 Mich. 1, 104 N.W.2 63, at p. 93, remanded by Supreme Court on April 23, 1962; 8 L. ed.2 1.

[6] *State* v. *Cunningham*; 81 Wisc. 440 at p. 484; 51 N.W. 724, 730.

of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution—a practical instrument of government—makes no such demands on the States."

Article II, § 1 of the Constitution of Maryland provides:

"The Legislature shall consist of two distinct branches, a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland."

In my opinion, the use of the word "distinct" in this Section means a substantial or material difference and not merely a slight difference in age eligibility as provided under § 9 of the same Article.

Section 2 is succinctly stated by Judge Prescott as follows:

"Section 2 provides, inter alia, that one State Senator shall be elected from each county and each of the six legislative districts of Baltimore City, by the qualified voters of their respective counties and legislative districts, and they shall serve for four years from the date of their election."

Section 5 is as follows:

"The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot, and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each."

Section 6 of the same Article also provides:

> The members of the House of Delegates shall be elected by the qualified voters of the Counties, and the legislative districts of Baltimore City, respectively, to serve for four years from the day of their election."

The historic distinction between the two Houses in Maryland was fully explained in footnote 11 of the Appellate Court's Opinion, so will not be repeated. I feel, however, that one of the Houses (in Maryland, the Senate) can be constitutionally based upon area and geographical location regardless of population or eligible voters. Such an arrangement protects the minorities. It prevents hasty, although popular legislation at the time. It is based upon history and reason and helps to protect the republican form of government guaranteed to the States by Article IV, § 4 of the United States Constitution. It preserves the checks and balances in the State Government which has worked so well under the Federal. Moreover, there would be little advantage in having a bicameral legislature if the composition and qualifications of the members were similar.

It is true that the great men of the Constitutional Convention of 1787, after lengthy debate, reached a compromise by providing for proportional representation in the Lower House and an equal vote for the States, regardless of population in the Upper House.[7]

Admitting that the plan was a compromise, must it not be conceded that it produced the government under which our great Country has prospered for almost two hundred years?

I do not agree with Petitioners' argument that the States of the Union are sovereign in contrast to the Counties, which are but political divisions of the State. States have not been sovereign or independent since the close of the Revolution in 1783 and we cannot turn the clock back to make them so. State sovereignty is contrary to the modern philosophy and operation of government and diminishes with each passing year.

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[7] *Krause*, The United States, p. 454-459.

I am inclined to agree with the Defendants that the combination of the four suburban Counties and Baltimore City for purposes of comparison is artificial. There is no invidious discrimination against Baltimore City in the House and it has a distinct advantage over all the suburban Counties in the Senate.[8] Anne Arundel County seems to be on the border line but is rapidly growing. It may be pointed out that the inclusion of Baltimore City improperly magnifies the various tax receipts and distributions enumerated in Plaintiff's Exhibit #2.

The various examples of malapportionment or unfair distribution were discussed in my original opinion and by the Appellate Court, so will not be repeated.

Therefore, without prolonging the matter further and acting as Chancellor under equitable principles, I have no hesitancy in finding from the facts presented that the people of Baltimore, Prince Georges and Montgomery Counties are invidiously discriminated against under the existing law. It necessarily follows that Article III, § 5 of the Maryland Constitution must be declared unconstitutional and void as violating the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States. In my opinion, the facts are insufficient to establish invidious discrimination against the people of Baltimore City. The question is close in Anne Arundel County, but as the equities must be weighed in favor of constitutionality, I find no invidious discrimination.

Although, for the reasons heretofore stated, I do not believe that § 2 of Article III is unconstitutional, I have decided not to make a determination of the question at this time. The Legislature, the Executive, and the People will have little respect for judicial decisions unless there is some finality in these decisions.

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[8] The applicability of the Federal System to the State of Maryland is of course weakened by the division of Baltimore City into legislative districts with six (6) Senators instead of one (1). Such an arrangement was probably thought necessary because of the unique position of the City at that time. I do not consider it feasible to discuss the question further at this time, except to note that Los Angeles, with a population of over five (5) million, had but one (1) State Senator.

An Order will therefore be signed in conformity with this Opinion and, as suggested by the Appellate Court.

1. Declaring that § 5 of Article III of the Constitution of Maryland and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates insofar as it applies to the General Election of November, 1962, violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, and therefore null, void and of no effect in regards to said Election, said Declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

2. Declaring that the members of the General Assembly have the power, if and when called into Special Session by the Governor, and such action be deemed appropriate by it to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

3. Declaring that the members of the General Assembly, if and when called into Special Session as aforesaid, are empowered in their discretion to propose a constitutional amendment providing for reapportionment.

4. Withholding injunctive relief at this time, but retaining jurisdiction in order that appropriate injunctive relief can be granted before the November, 1962 Election, should the situation at that time so justify.[9]

Solicitors for the respective parties may submit an appropriate Order in conformity with the above.

/s/ O. Bowie Duckett,
Judge.

[9] I regret that I have not had sufficient time to write a more enlightening Opinion on this important question. The outstanding ability and exhaustive research of many members of the judiciary and writers are amazing and worthy of the highest commendation. This difficult question is now up to the members of the Legislature who are expected to rise above their personal or local views and enact legislation beneficial to the welfare of our State as a whole. Less would be below the exalted standing of the Legislature, as the predominant branch of our Government.

(Filed: May 28, 1962)

IN THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY

No. 13,920 EQUITY

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*

v.

J. MILLARD TAWES, GOVERNOR, *et al.*

DECREE

THIS CAUSE having been remanded for further proceedings in conformity with the Opinion of the Court of Appeals of Maryland, filed April 25, 1962 *(228 Md. 412)*, and having come on for hearing, Exhibits were filed, Solicitors heard, Briefs submitted and pleadings read and considered;

WHEREUPON, it is ORDERED this 28th day of May, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, and by authority of this Court for the reasons set forth in the Court's Opinion of May 24, 1962 (*Daily Record*, May 28, 1962), ADJUDGED, ORDERED and DECREED that:

(1) § 5 of Article III of the Constitution of Maryland, and all of the previous provisions of the original Constitution of 1867 and Amendments thereto relating solely to the apportionment of membership of the House of Delegates, in so far as they apply to the General Election of November, 1962, violate the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States and inconsistent with Article 2 of the Declaration of Rights, be, and the same are hereby, declared null, void and of no effect in regards to said Election; said declaration having no effect whatsoever upon the tenure and terms of the present members of the House of Delegates.

(2) In regards to § 2 of Article III of the Constitution of Maryland, the Chancellor makes no finding at this time, but retains jurisdiction and reserves the right for a future Decree under established equitable practice.

(3) The members of the General Assembly in Special Session, and in any subsequent Session, have the power in their discretion to enact a bill reapportioning its membership for purposes of the November, 1962 Election.

(4) The members of the General Assembly in Special Session, and in any subsequent Session, are empowered likewise in their discretion to propose a constitutional amendment providing for reapportionment.

(5) Injunctive relief is hereby withheld at this time, the Chancellor retaining jurisdiction in order that appropriate relief can be granted before the November, 1962 Election, should the situation at that time so justify; costs to be paid equally by the respective parties.

O. Bowie Duckett,
Judge.

(Filed June 28, 1962)

In the Circuit Court for Anne Arundel County

No. 13,920 Equity

Maryland Committee for Fair Representation, *et al.*

v.

J. Millard Tawes, Governor, *et al.*

Supplemental Opinion

On June 8th, 1962, the Court of Appeals of Maryland remanded the above case to this Court with directions to enter a decree declaring Section 2 of Article III of the Maryland Constitution to be valid or invalid, as the Court may determine. This Court must therefore determine whether the Maryland Senate is a legal body.

Since the filing of my Opinion on May 24th, holding that apportionment in the House of Delegates was unconstitutional but making no determination as to the Senate, the General Assembly at the call of the Governor has met in Special Session and on May 31st, 1962 enacted reapportion-

ment legislation which added nineteen (19) members to the House of Delegates. It appears, therefore, and the Petitioners have conceded, that the Lower House has been legally reapportioned according to population. Wherefore, the present issue is much simpler than originally presented when neither House was apportioned on a population basis. The narrow issue now presented is whether that Section of the Maryland Constitution providing for area representation in the Senate is valid or invalid. Stating the question differently, does the Fourteenth Amendment, which guarantees equal protection, require that a State having one House of its Legislature fairly based on population, shall also base its other House on population?

Initially, it must be recognized that it is not the function or duty of a nisi prius court to protect its personal views by changing the law but should follow the existing law and legal precedents if possible. The Chancellor should not engage in judicial experimentation or void a section of the State Constitution unless clearly illegal. Inequality of representation is not enough for this Court to declare an enactment invalid. There must be unjust or invidous discrimination.[1]

Up to the present, it must be conceded that there is no authoritative decision holding that both Houses of a Legislature must be based on population. Just as recent as May 25th, Judge Tuttle, speaking for a three-Judge Court,[2] after stating that there is some basis for Plaintiff's contention, said:

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[1] While the Supreme Court of the United States, and to a lesser extent, the States' Supreme Courts, may alter existing law because of a change in conditions or a change in the viewpoint of society (sometimes called "following the election returns") this function is not one for a trial court. As vividly expressed by one of the greatest Judges of all times: "We have x x x no right as a presently inferior Court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant." Judge Learned Hand, *Spector Motor Serv.* v. *Walsh*, 139 F.2d 803, 823; also quoted *Spector Motor* v. *McLaughlin*, 323 U.S. 101, 89 L.ed. 100 and *Scholle* v. *Hare*, 104 N.W.2d 63, at p. 122. Likewise, as Judge Murrah said: "It is not the function of this Court to psychoanalyze the justices of the Supreme Court in order to devine the trend of decisions." (145 F.Supp. 541.)

[2] *Toombs* v. *Fortson*, U.S. Dist. Ct. N.D.Ga., 30 L. Week 2606.

"However that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the Plaintiff his constitutional rights the State Legislature must be constituted as two Houses, both of which are elected according to population."

The Solicitor General of the United States in discussing the effect of *Baker* v. *Carr* before the Tennessee Bar Association on June 8th, 1962, said in part:

"* * * In Baker v. Carr we also argued that the starting point in determining the constitutionality of any apportionment should be *per capita* equality of representation and that any serious departure from this standard is invalid unless shown to have a rational justification. Both points were largely based upon history, for history is a powerful influence in constitutional law. State constitutions reflect the extent to which the idea of equality of voting power is imbedded in our political heritage, as I indicated above. They also suggest some of the justifications for diverging from exact numerical equality—the claims of historically separate units such as towns and counties to have equal recognition, the desirability of distributing political power geographically, the need to prevent a single large city or two from dominating an entire State; in New Hampshire seats in the Senate are allocated in the ratio of direct taxes paid. I do not mean to suggest how the question should be decided, but it would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions *provided that the departure from equal representation in proportion to the population is not too extreme.* But surely a very strong argument can also be made that there must be representation proportionate to population in at least one branch of the legislature. * * *"

Difficulties of the Problem

The combination of several factors makes the determination of this involved problem more difficult. Among these are:

(1) The important and far reaching problem, involving the control by one co-ordinate branch of the State Government over another, presents a most delicate question.[3]

(2) Until the recent pronouncement of *Baker* v. *Carr*,[4] the Court had considered the question "political" so there are few recognized precedents or guideposts to follow.

(3) The Supreme Court in *Baker* v. *Carr* laid down no rules as to what apportionment of representation satisfies the requirements of the Fourteenth Amendment.

(4) The long established reluctance of the judiciary (regardless of its power) to compel action on the part of the Legislature. In this regard, it may be noted that Judges are trained to interpret laws, not to propose or prepare legislation which function has heretofore been performed by the Legislature.

(5) Unlike many other States, Maryland does not provide for reapportioning the General Assembly or for basing the Senate's representation on population.

(6) The State of Maryland should be "allowed every reasonable latitude * * *, and any discrimination therein will not be set aside any state of facts reasonably may be conceived to justify it."[5]

(7) Controversies such as this were distinguished Appellate Judges of equal experience and ability reach different conclusions, not on the general law but on their individual beliefs, philosophies or background, tend to establish a government of men and not of law and therefore

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[3] *Comm.* v. *Tawes*, 228 Md. 412; 180 A.2d 656.

[4] 369 U.S. 186; 7 L.ed.2d 663.

[5] *Comm.* v. *Tawes*, 228 Md. 412, citing *McGowan* v. *Md.*, 366 U.S. 420, 426 (1961).

contrary to our concept of sound government, and in violation of Canon 20 of Judicial Ethics.[6]

Contentions Made

Several strong arguments have been made by the Petitioners in their written and oral arguments before this Court. Points of little merit have also been advanced. For example, the Petitioners state that maximum dilution of voting rights with respect to the Maryland State Senate reaches as high as 33 to 1, whereas in the Michigan case of *Scholle* v. *Hare*, the maximum dilution is 15 to 1. These figures mean very little as the maximum dilution in the United States Senate is 75 to 1. Regardless of this, it must be conceded that if representation in the Maryland Senate is based on population there exists invidious discrimination.

Petitioners also contend in their motion that in the United States Senate a majority of the population has a majority of the representation, which is not the case in the Maryland Senate. This statement is erroneous. According to the 1960 Census, the 26 less populated States have a population in round figures of 31 million, so these States with 17 per cent of the population have 52 per cent of the representation.

Sovereignty

Petitioners' main point is their contention that Maryland should not continue under the Federal Plan because of State sovereignty in contrast to the Counties which are

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[6] *Judicial Canon 20. "Influence of Decisions Upon the Development of the Law."*

"A judge should be mindful that his duty is the application of general law to particular instances, that ours is a government of law and not of men, and that he violates his duty as a minister of justice under such a system if he seeks to do what he may personally consider substantial justice in a particular case and disregards the general law as he knows it to be binding on him. Such action may become a precedent unsettling accepted principles and may have detrimental consequences beyond the immediate controversy. He should administer his office with a due regard to the integrity of the systems of the law itself, remembering that he is not a depository of arbitrary power, but a judge under the sanction of law."

but political divisions of the State. *Daly* v. *Morgan*, 69 Md. 460. My original Opinion to the contrary is stated to be radical. By the great weight of modern authority, States are not now possessed of true or external sovereignty.[7] They do possess internal sovereignty, or at least the right to many of the attributes of internal sovereignty, subject to restrictions imposed by or arising from the Federal Constitution.[8]

Sovereignty in its full sense imports the supreme, absolute and uncontrollable power, subject to no other state, nation or potentate on earth. While a state may still have some attributes of sovereignty, all must concede that they have been greatly diminished.[9]

Petitioners therefore contend that because of this so-called "state sovereignty," it is legal and reasonable to base the United States Senate on area alone, but that it is illegal and unreasonable to use the same factor in determining senate representation in Maryland.

Petitioners correctly argue that this Government was a result of a compromise and infer that a better government would have been established if it had not been for the smaller States.[10] Disregarding the fact that the people

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[7] *State* v. *Hyman*, 98 Md. 596, 613; *81 C.J.S.*, States, § 2, 858; *Comm.* v. *Hague*, 25 F. Supp. 127; modified on other grounds 101 F.2d 774; 307 U.S. 496.

[8] *Chrisholm* v. *Ga.*, 2 U.S. 419-455; 1 L.ed.440. *People* v. *Toole*, 86 Pa. 224; 35 Colo. 225. *Moore* v. *Smaw*, 17 Cal. 199-218; 79 Am.Dec. 123. *1 Blackstone*, Commentaries 241-242.

[9] The original thirteen States have not been truly sovereign and independent since the close of the Revolution. The Civil War settled finally and conclusively that the States are merely indispensable units of a single national sovereign. Developments since 1933 have greatly increased the dominance of the national government over state government. States cannot enter into contracts or compacts with other States without Federal permission. They may not deport undesirables found in their midst. The National Government now determines the planting acreage of crops and the conditions and prices in the marketing of milk. Many other examples of the ever increasing power of the National Government can be given. *Encyclopedia Britannica*, Vol. 2, United States of America, p. 764. *U.S.* v. *Morelock*, 124 F. Supp. 932.

[10] Many do not agree with the position taken by the Petitioners. James Madison, the father of the Constitutional Convention, was of the opinion

under this document have prospered for almost 200 years to become the greatest Country on earth, I cannot believe that the mere use of the word "sovereignty" can as a practical matter sustain the Federal System and invalidate the States. If the Petitioners do not believe in the federal or republican form of government but would prefer a pure democracy or town meeting system, they should say so directly and not masquerade under the guise of state sovereignty.

If our Federal System of checks and balances is good for the Nation, it likewise should be good for the States. While a State undoubtedly possesses more attributes of sovereignty than a Charter County, the difference is largely one of degree and of no practical importance in determining the validity and effectiveness of the system itself. It is merely a play on words to contend that the word "sovereignty" should determine the issue. The desired effect of preventing hasty and ill conceived legislation would be attained in the same manner and just as completely in the General Assembly of Maryland as it is in the Congress of the United States.

Legislative Districts

In my opinion, Petitioners' most impressive argument is that the State of Maryland abandoned the federal plan by dividing the City of Baltimore into legislative districts. As stated in original Opinion, the earlier change was probably due to the unique position of Baltimore City at that time. Not only was its population greater than the rest of the State combined, but the City is in quite an unique position due to the fact that it is an independent City or

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that there should be equality of men in the House and equality for the States in the Senate, by which means the citizens of the States would be represented both individually and collectively. Checks and balances to curb sudden impulses of mere majorities would thereby be attained.

Sixty years after the Constitutional Convention of 1787, John C. Calhoun paid the smaller States the following tribute: "It is owing mainly to [certain small States] that we have a Federal instead of a National (that is unitary) government—the best government instead of the worst and most intolerable."

County in itself. It is, therefore, not merely a part of several counties, which is usually the case of other large cities in this Country, such as New York City, for example. The concentrated masses in Baltimore were therefore given several Senators by dividing the City into legislative districts, which was similarly accomplished in the other large cities by being in several counties.

Petitioners also attempt to distinguish the Maryland and Federal Plan by stating in case of the United States, the Lower House is based strictly on population, while in Maryland, it is not. As a matter of fact, the House of Representatives is not based strictly on population because 5 of the least populated States are allocated 1 representative in Congress, even though not entitled under the population ratio. Indians who pay no taxes are also not counted.

Maryland's Position

The Government of the State of Maryland presents a different problem from that of many other States which have been considered by the Courts. Our State Constitution, contrary to that of others, makes no provision for reapportionment. Our Constitution expressly provides for two distinct branches of the General Assembly. Such required bicameralism presupposes two different and distinct representation bases for its construction and utilization.

So far as history or tradition is a controlling factor, Maryland stands in the forefront. The Senate of the United States itself was formed on the model of that of Maryland.[11]

Representation Based on Population

While representation in the Senate in a number of States is based on population, because of the constitutional requirements of those States, this factor is not universal. Other bases for apportionment are county, district, town and parish areas; male inhabitants, legal voters, direct taxes paid and restricted population by excluding service-

[11] *The Journal of the Constitutional Convention*, published by G. P. Putnam Sons, 1903, p. 202.

men, aliens and Indians. State senates vary in membership from 17 each in Delaware and Nevada to 67 in Minnesota.[12]

Conclusion

Briefly, the reasons given in the original Opinion that the Maryland Senate can be constitutionally based upon area and geographical location regardless of population, were:

(1) The system protects minorities and prevents hasty, although, popular, legislation at the time.

(2) It preserves checks and balances and the republican form of government.

(3) If is based on history, tradition and reason.

Nothing has transpired since this Decision to change my mind. Petitioners propose to increase the Senate by 14 members at this time.[13] Under this plan, it would again be necessary to increase the Senate upon an increase in population.

Increasing the size of a legislative body is generally not desirable. It sacrifices legislative efficiency and adds to the costs.[14] Petitioners have lately taken the position that if the Maryland Senate cannot be based strictly on population, it should be based partly on population and partly on

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[12] *The Book of the States*, 1960-61, pgs 31 54-58; *43 Mich. L. Rev.*, p. 1091-1112; *17 Law and Contemporary Problems*, pgs 253-469, (1952).

[13] Under this proposal, Baltimore City's representation in the Senate would be increased from 6 to 9; Baltimore County from 1 to 5; Prince George's and Montgomery Counties, each, from 1 to 4, and Anne Arundel County from 1 to 2, thereby increasing the total membership of the Senate from 29 to 43.

[14] If, because of changed conditions, the General Assembly decides that it should follow the Federal Plan strictly, it could reduce Baltimore City's membership in the Senate to 1 and continue a single Senator for each County. Another, and perhaps more feasible, plan properly related to population would be to reduce Baltimore City (pop. 940,000) to 4 Senators, then divide Baltimore County (pop. 492,000) into 2 legislative districts with a Senator for each and continue all other Counties for the present with one Senator. It could then be provided that when any County reached a population of approximately 500,000, it would likewise be entitled to two Senators. Projected population studies show that this would be attained by Montgomery and Prince George's Counties in 1970.

area. They further state that this modified or hybrid plan is beneficial as it prevents hasty legislation and permits a second look before a law is enacted. The plan is used in a number of States in compliance with their Constitutions, and is generally valid. I feel that this plan merely dilutes or diminishes the benefits obtained under the Maryland and Federal System and would change this State's established Government. It is a plan which Maryland has the power to adopt but which it cannot be compelled to do. Each of the States has the right to determine and establish their own system of representation, provided there is some reasonable ground of justification for this determination. In addition to population, factors such as area, history, geography and tradition have always been recognized as reasonable when applied to one house of a legislature. In my opinion, Article III, Section 2 of the Maryland Constitution is therefore valid and constitutional.

O. Bowie Duckett,
Judge.

(Filed: June 28, 1962)

In the Circuit Court for Anne Arundel County

No. 13,920 Equity

The Maryland Committee for Fair Representation, *et al.*,

v.

J. Millard Tawes, Governor, *et al.*

Decree

The above matter having come on for hearing, in compliance with the Order of the Court of Appeals dated June 8, 1962, counsel were heard, Memoranda submitted, and the Court, for the reasons set forth in its Supplemental Opinion, is of the opinion that Article III, Section 2 of the Constitution is valid.

WHEREUPON, it is, this 28th day of June, 1962, by the Circuit Court for Anne Arundel County, sitting in Equity, ADJUDGED, ORDERED and DECREED that Section 2 of Article III of the Constitution of the State of Maryland be, and the same is hereby, declared to be valid and constitutional; costs to be paid by the Petitioners.

O. BOWIE DUCKETT,
Judge.

APPENDIX C

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article III, Section 2, of the Maryland Constitution provides that:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contigous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for.

Article III, Section 5, of the Maryland Constitution (now inoperative) provided that:

> Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each;

Carroll, Dorchester, Hanford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

Chapter 1, Acts of the Special Session, Maryland General Assembly, May, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), reads as follows:

AN ACT to add a new Section 42 to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", revising the provisions concerning the membership of the House of Delegates and the representation of the several political sub-divisions therein, making provision for the nomination and election of certain candidates for office in the House of Delegates, ~~MAKING AN EMERGENCY APPROPRIATION TO THE BOARD OF PUBLIC WORKS FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1963, TO BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS TO PAY A PORTION OF THE COST OF SPECIAL PRIMARY ELECTIONS FOR THIS PURPOSE,~~ and relating generally to the membership and election of the members of the House of Delegates of Maryland ~~AND TO AN EMERGENCY APPROPRIATION FROM THE STATE TREASURY FOR THE PAYMENT OF A PORTION OF THE COST OF SPECIAL ELECTIONS UNDER THIS ACT.~~

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", and to read as follows:

42.

(a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.

(b) ~~After and based upon the final official publication of the Federal census of 1970, and after such publication of each decennial Federal census thereafter, there~~ THERE *shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.*

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as

determined by each official decennial Federal census, shall be in accordance with the following formula:

~~*The total population of the State according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed to the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the State and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.*~~

THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER SIXTY-FIVE (65). THE RESULTING QUOTIENT, COMPUTED AS THE NEAREST WHOLE NUMBER, IS THE UNIT OF POPULATION NECESSARY FOR AN ADDITIONAL DELEGATE. THE UNIT OF POPULATION, AS DIVISOR, SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND OF EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY WHICH HAS A POPULATION IN EXCESS OF THE UNIT OF POPULATION. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN ADDITIONAL NUMBER OF DELEGATES EQUAL TO THE RESULTING QUOTIENT IN EACH INSTANCE, DROPPING ANY FRACTIONAL REMAINDER. IF THE TOTAL NUMBER OF DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123), ADDITIONAL DELEGATES SHALL BE

AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE LAST MENTIONED QUOTIENTS HAVE BEEN COMPUTED, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.

~~THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER ONE HUNDRED AND TWENTY-THREE (123). THE RESULTING QUOTIENT, TAKEN TO THE NEAREST FIGURE OF AN EVEN THOUSAND, IS THE UNIT OF POPULATION UNTIL A SIMILAR COMPUTATION IS MADE FOLLOWING THE NEXT CENSUS. THE UNIT OF POPULATION SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN AGGREGATE NUMBER OF DELEGATES (WHICH INCLUDES ITS MINIMUM OF TWO DELEGATES) AS ITS POPULATION EXCEEDS THE NUMBER OF UNITS OF POPULATION LISTED IN THE FOLLOWING SCHEDULE:~~

~~WHEN THE POPULATION OF THE COUNTY OR LEGISLATIVE DISTRICT EXCEEDS THIS NUMBER OF UNITS OF POPULATION~~	~~THE COUNTY OR LEGISLATIVE DISTRICT IS ENTITLED TO THIS TOTAL NUMBER OF DELEGATES~~
~~ONE UNIT SUBDIVISIONS~~	
~~2~~	~~3~~
~~3~~	~~4~~

~~TWO UNIT SUB-DIVISIONS~~	
~~4~~	~~5~~
~~6~~	~~6~~
~~8~~	~~7~~
~~THREE UNIT SUB-DIVISIONS~~	
~~10~~	~~8~~
~~13~~	~~9~~
~~16~~	~~10~~
~~FOUR UNIT SUB-DIVISIONS~~	
~~19~~	~~11~~
~~23~~	~~12~~

~~ALSO, FOR EVERY FOUR ADDITIONAL UNITS OF POPULATION IN EXCESS OF TWENTY-THREE UNITS, THE COUNTY OR LEGISLATIVE DISTRICTS SHALL RECEIVE ONE ADDITIONAL DELEGATE.~~

~~IF THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING MORE THAN ONE UNIT OF POPULATION AND HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE QUOTIENTS HAVE BEEN COMPUTED IN APPLYING THE TABULAR FORMULA ABOVE, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

~~IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION, REMAINDERS FOR COUNTIES OR LEGISLATIVE DISTRICTS UNDER THE FOUR SUB-HEADINGS IN THE TABULAR FORMULA ABOVE SHALL BE~~

~~GIVEN WEIGHTED VALUES AS FOLLOWS: FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "ONE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY FOUR; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "TWO UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY THREE; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "THREE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY TWO; AND FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "FOUR UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY ONE. THESE WEIGHTED VALUES (AND NOT THE SIMPLE ARITHMETIC VALUES) THEN SHALL BE USED IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION IN AWARDING ADDITIONAL DELEGATES AS REMAINDERS.~~

~~IF AFTER ALL THESE COMPUTATIONS THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER OF POPULATION TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING A POPULATION LESS THAN ONE UNIT OF POPULATION, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

(d) Not later than December 31, 1965, the Governor shall make the estimations of population and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 ~~AND THE YEAR 1970~~ *shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this sub-section; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.*

(e) Notwithstanding anything to the contrary in sub-sections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in ~~November, 1962~~, AND FOR ANY ADDITIONAL PERIOD DURING WHICH THIS SECTION MAY BE EXTENDED *each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c)* BASED UPON THE FEDERAL CENSUS OF 1960 *shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.*

~~*(f) In accordance with the formula in sub-section (e), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.*~~

~~*(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional memberships herein created. These nominations shall be made prior to August 1, 1962.*~~

(F) IN ACCORDANCE WITH THE FORMULA IN SUB-SECTION (C), THE NUMBER OF ADDITIONAL MEMBERSHIPS IN THE HOUSE OF DELEGATES, FOR WHICH NOMINATIONS ARE TO BE MADE BY THE LOCAL CENTRAL COMMITTEES, IS AS FOLLOWS: ANNE ARUNDEL COUNTY, 1; BALTIMORE COUNTY, 7; MONTGOMERY COUNTY, 4; PRINCE GEORGE'S COUNTY, 4; THIRD DISTRICT OF BALTIMORE CITY, 2; FIFTH DISTRICT OF BALTIMORE CITY, 1.

(G) THE LOCAL CENTRAL COMMITTEE OF EACH PARTY WHICH WAS ELECTED ON MAY 15, 1962, IN THE SEVERAL COUNTIES OR LEGISLATIVE DISTRICTS RESPECTIVELY, SHALL NOMINATE PERSONS AS CANDIDATES FOR THE HOUSE OF DELEGATES FOR THE ADDITIONAL MEMBERSHIPS HEREIN CREATED. THESE NOMINATIONS SHALL BE MADE PRIOR TO AUGUST 1, 1962.

~~(F) (I) IN THOSE COUNTIES AND LEGISLATIVE DISTRICTS FOR WHICH THERE IS AN INCREASE IN REPRESENTATION, A SPECIAL PRIMARY ELECTION, BUT ONLY FOR SUCH INCREASED REPRESENTATION IN THE HOUSE OF DELEGATES, SHALL BE CONDUCTED ON TUESDAY, JULY 17, 1962. CERTIFICATES OF CANDIDACY FOR THIS PRIMARY ELECTION SHALL BE FILED NOT LATER THAN MIDNIGHT ON MONDAY, JUNE 11, 1962. THE FINAL TIME TO WITHDRAW AS A CANDIDATE IS MIDNIGHT ON FRIDAY, JUNE 15, 1962. THIS ELECTION IS DECLARED TO BE A "PRIMARY ELECTIONS" WITH RESPECT TO PROVISIONS IN ARTICLE 33 OF THIS CODE, TITLE "ELECTIONS" WHICH CONCERNS THE REGISTRATION OF VOTERS.~~

~~(II) EXCEPT AS IN THIS SECTION OTHERWISE SPECIFICALLY PROVIDED, THE PROVISIONS OF SAID ARTICLE 33 CONCERNING THE REGISTRATION OF VOTERS AND THE CONDUCT OF PRIMARY ELECTIONS IN THIS STATE AND IN THE RESPECTIVE POLITICAL SUB-DIVISIONS OF THIS STATE APPLY WITHIN THE PARTICULAR POLITICAL SUB-DIVISIONS IN WHICH THE SPECIAL PRIMARY ELECTIONS ARE HELD.~~

~~(III) THE BOARD OF SUPERVISORS OF ELECTIONS IN EACH SUCH POLITICAL SUB-DIVISION, AND ALL OTHER OFFICIALS AND EMPLOYEES OF THIS STATE AND OF THE RESPECTIVE POLITICAL SUB-DIVISIONS, SHALL DO THOSE THINGS WHICH ARE NECESSARY AND PROPER TO AR-~~

~~RANGE FOR AND CONDUCT THESE SPECIAL PRIMARY ELECTIONS.~~

~~(IV) THERE IS APPROPRIATED TO THE BOARD OF PUBLIC WORKS, AS AN EMERGENCY APPROPRIATION FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1962, THE SUM OF TWO HUNDRED THOUSAND DOLLARS ($200,000). THIS APPROPRIATION SHALL BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS FOR THE PAYMENT OF ONE-HALF OF THE COST OF THE SPECIAL ELECTION IN EACH OF THE SEVERAL COUNTIES AND LEGISLATIVE DISTRICTS IN WHICH UNDER THE PROVISIONS OF THIS SECTION CERTAIN ADDITIONAL CANDIDATES ARE TO BE NOMINATED FOR MEMBERSHIP IN THE HOUSE OF DELEGATES. IF ANY PORTION OF THIS APPROPRIATION IS NOT EXPENDED ON SEPTEMBER 30, 1962, IT SHALL REVERT TO THE GENERAL FUNDS OF THE STATE TREASURY.~~

~~*(G) (h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for*~~

(H) THE NOMINEES, IN THE RESPECTIVE NUMBERS INDICATED IN SUB-SECTION (F), SHALL BE SO DECLARED. THEY SHALL BECOME NOMINEES FOR *the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the* ~~*local central committees*~~ ~~SPECIAL PRIMARY ELECTIONS PROVIDED FOR HEREIN~~ LOCAL CENTRAL COMMITTEES *who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.*

~~(H)~~ (I) ~~(i)~~ *Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.*

~~(I)~~ (J) ~~(j)~~ *This section establishes the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.*

SEC. 2. *And be it further enacted,* That this Act shall take effect on June 1, 1962. IF THIS ACT HAS NOT ALREADY BEEN SUPERSEDED BY AN AMENDMENT TO THE CONSTITUTION OF MARYLAND UNDER THE PROVISIONS OF SUCH SUB-SECTION (J) HEREINABOVE, IT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1966; PROVIDED, HOWEVER, THAT IF AT THE GENERAL ELECTION IN THE MONTH OF NOVEMBER 1964 THERE IS SUBMITTED TO THE VOTERS OF THE STATE OF MARYLAND A PROPOSED CONSTITUTIONAL AMENDMENT WHICH WOULD SO SUPERSEDE THE PROVISIONS OF THIS SECTION, AND IF AT THAT TIME THE VOTERS OF THE STATE OF MARYLAND REJECT AND DO NOT RATIFY THIS PROPOSED CONSTITUTIONAL AMENDMENT AND THE PROVISIONS OF THIS ACT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1970. IN THE EVENT THERE IS SUCH AN AUTOMATIC REPEAL OF THIS SECTION EITHER IN 1966 OR 1970 AS PROVIDED HEREINABOVE, THE

MEMBERSHIP OF THE HOUSE OF DELEGATES OF MARYLAND THEREAFTER SHALL BE THE SAME AS IT WAS IN THE SEVERAL POLITICAL SUB-DIVISIONS AND IN ITS ENTIRETY ON JANUARY 1, 1962. NOTHING IN SUCH A REPEAL EITHER IN 1966 OR 1970 SHALL AFFECT THE ELECTION, TENURE, POWERS, PRIVILEGES, AND DUTIES OF ANY MEMBER OF THE HOUSE OF DELEGATES IN OFFICE AT THE TIME OF THE REPEAL FOR THE REMAINDER OF THE TERM FOR WHICH HE HAS BEEN ELECTED.

Approved May 31, 1962.

(4392-7)

CORRECTED COPY

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*

v.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*

On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

ALFRED H. CARTER,
County Attorney for Montgomery County

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

Attorneys for Montgomery County, Maryland

County Office Building
Rockville, Maryland
POplar 2-2121, Ext. 251

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*

v.

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On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

INTEREST OF AMICUS CURIAE

This brief is filed pursuant to Rule 42(4) of the Rules of this Court. Montgomery County, Maryland, appeared by brief and by argument as Amicus Curiae in the trial court and by brief in the Court of Appeals of Maryland. Montgomery County is a political subdivision of the State of Maryland, and this brief is submitted by its authorized law officers. Charter of Mont. Co., Art. IV, § 3, Mont. Co. Code 1960.

Of the 23 counties in the state, Montgomery is third in population with 383,000 persons as of July 1, 1962 (1960 Census as modified by Maryland-National Capital Park and Planning Commission) and ranks sixth

in total geographical size at 506 square miles. Md. Manual 1961-62, p. 625. In land area (as opposed to water area) the County ranks fifth with 493 square miles. *Ibid.* When the six geographically largest counties are compared by populations, Montgomery County stands second only to Baltimore County. *Id.* at pp. 625 & 629.

Montgomery County has the highest median family income of any county in the United States and is a highly educated, professionalized community. U. S. Census 1960. (Washington Post, City Section, p. 1, Oct. 28, 1962) Over 11% of the people of Maryland live in Montgomery County; they pay 19% of the total state income tax. Report of Comptroller, State of Maryland, 1960, published Feb. 15, 1962.

The issues presented in the instant case are of vital interest to, and vitally affect, the government and all of the citizens of the County. Montgomery County, as an expanding urban-suburban county making up part of the Washington Metropolitan Area, must have fair and equal representation in the state legislature in order to assert the needs and interests of its people, to meet the great challenges with which it and the State of Maryland are faced, to provide for its citizens the services of government and the improvements in urban, suburban, and agricultural living to which they are entitled.

Efforts for relief within the state have proved futile or at best only temporarily hopeful. See Art. 40, § 42, Ann. Code Md. (1957), as amended (1962 Cum. Supp.) for temporary reapportionment of House of Delegates until 1966. Montgomery County has joined with appellants in their battle for fair representation at all levels in all three branches of the state government.

Now, state legislative and judicial avenues to fair representation have been closed to further passage. It remains to pursue the matter to this Court.

ARGUMENT

The Maryland Court of Appeals Has By Its Decision Below Permanently Approved Representation in the Senate and in the General Assembly of Maryland as a Whole at an Increasing Invidiously Discriminatory Ratio in Violation of the 14th Amendment of the United States Constitution. and This Court is the Only Relief for a Determination of the Question

This case comes before the Court from the decision below, which held, in effect, that if one house of the state legislature is barely apportioned on the basis of population, the other house constitutionally may be apportioned solely geographically without regard to population. *Maryland Committee for Fair Representation* v. *Tawes, The Daily Record*, Oct. 16, 1962, p. 2 (Balto., Md.)

The precise legal framework of this decision is as follows:

Sections 2 and 5 of Article III of the Maryland Constitution were ratified by the electorate of Maryland on November 7, 1956, permanently dividing the membership of the Senate and House of Delegates of Maryland among the twenty-three counties and the City of Baltimore without regard to population and making no provision for future reapportionment of either house on the basis of population.

The amendments were submitted to the electorate with *fourteen pages of miscellaneous changes to the Constitution in one ballot question* "For the Constitutional Amendments" or "Against the Constitutional Amendments". Ch. 99, Laws of Md. 1956.

With this indistinguishable package, the voters unknowingly approved invidiously discriminatory representation in both Houses and fastened, on the majority of the state population, control in a handful of representatives from counties of small population.

Prior to *Baker* v. *Carr*, 369 U.S. 186 (1962), the Maryland Court of Appeals heard argument but did not act in this case on the reapportionment question. After *Baker* v. *Carr, supra*, and reargument, the Court of Appeals reversed and remanded a state circuit court ruling upholding the two sections in question. *Maryland Comm.* v. *Tawes*, 228 Md. 412, 180 A. 2d 656 (1962) Subsequently, Section 5 of Article III of the Maryland Constitution was declared invalid, but the Court of Appeals by a 4 to 3 decision upheld the validity of Section 2 of Article III, permanently fixing the representation in the Senate of Maryland at one senator for each county and six for Baltimore City, without regard to population. *Maryland Comm.* v. *Tawes, The Daily Record, supra.*

The question which appellants and Montgomery County will request this Court to examine is the validity of Section 2 of Article III establishing Senatorial representation in Maryland and the validity of the representation of the General Assembly as a whole in which there is no reasonable relation between the numbers of citizens and representation in the state legislature.

Under this decision of the Maryland Court of Appeals there continues to be legislative discrimination against Montgomery County. Montgomery County is a chartered county—one of only two in the state. It is a creature of the Constitution of Maryland, Md.

Const. Art. XI-A., and its powers are strictly delimited and defined by the General Assembly under authority of the Maryland Constitution. Although the majority opinion of the Court of Appeals, *The Daily Record, supra*, describes local autonomy of Maryland's counties, the reverse is true. Montgomery County operates at the sufferance of the state, its powers and citizens absolutely subject to the ultimate control of the legislature. Article XI-A, Sec. 2 of the Maryland Constitution provides in pertinent part:

> The General Assembly . . . shall by public general law provide a grant of express powers for such County . . . as may hereafter form a charter under the provisions of this Article. Such express powers . . . shall not be enlarged or extended by any charter . . . but such powers may be extended, modified, amended or repealed by the General Assembly.

The County can pass no law in conflict with the public general law of Maryland. Md. Const. Art. XI-A, § 3. By simple majority in each house of the legislature, any of the powers expressly granted to Montgomery County by Art. 25A, Ann. Code Md. (1957) (The Express Powers Act) can be repealed. Md. Const. Art. III, § 28.

The unequal composition of the Senate (and consequently the unequal composition of the Assembly as a whole when viewed realistically) has an immediate impact on the way in which state funds are allocated to the counties. As a typical example, gasoline tax revenues are so divided that the state receives 50%, Baltimore City gets 30%, and the remaining 20% is allocated to the 23 counties. Art. 56, § 137 and Art. 89B §§ 32-34, Ann. Code Md. (1957). Maryland county programs are absolutely dependant on distribution formulas for state funds, education being a foremost example, and

no hope of changing the state laws is forthcoming unless a fair reapportionment of the legislature is effected.

As permanently fixed by Section 2 of Article III of the Maryland Constitution, each of the counties has one state senator. (Baltimore City has six, one for each legislative district.) The 23 counties vary in population from approximately 15,500 to more than 500,000. Prior to 1962, Montgomery County had six delegates to the state House of Delegates, but during a special session of the legislature in May of 1962, under canons of the courts, its representation in the House was increased temporarily to 10. Ch. 1, Laws of Md. 1962, 2d Spec. Sess.; Art. 40, § 42, Ann. Code Md. (1962 Cum. Supp.) It serves no Constitutional purpose to correct the inequities in the House of Delegates without at the same time realigning the representation in the Senate. The absurdity of votes in a slightly representative House being nullified by a grossly malapportioned Senate need be considered only once.

On the basis of the 1960 Census, Montgomery County's population was 340,928 (now estimated at 383,000) of the Maryland state total of 3,100,689, or approximately 11% of the state total. With over one-tenth of the state population, the County has but one twenty-ninth of the vote in the Maryland Senate and but one-fourteenth of the vote in the House of Delegates, as the House was recently reapportioned under court mandate on May 31, 1962. Art. 40, § 42, Ann. Code Md. (1962 Supp.), *supra*.

Even under this temporary lower house reapportionment, which expires automatically on January 1, 1966, unless three-fifths of each house of the General Assembly subsequently approves submission of a referendum to the state electorate, there is purposeful and

systematic discrimination against the citizens of the County which reduces their rightful representation in the state legislature, denies them a full vote in equality with other voters and is a denial of equal protection under the first section of the 14th Amendment of the United States Constitution.

The lone Senator from Montgomery County represents in 1962 more than 24 times as many persons as the Senator from Kent County—and every year the population increase of Montgomery County exceeds the entire present population of Kent County. Despite its already remarkable growth, Montgomery County's projected population reveals that absent overall reapportionment, the legislative discrimination against the County will be all the more discriminatory in 1965, 1970 and beyond. Already in the two years since the 1960 census, Montgomery County has added about 43,000 persons. Since 1960, Montgomery County has added more than double, or approximately double, the entire separate populations of Calvert, Caroline, Garrett, Kent, Queen Anne's, Somerset, Talbot, and Worcester Counties. Yet each of these eight counties enjoys equal senatorial representation with Montgomery. The Maryland-National Capital Park and Planning Commission projects that by 1970 Montgomery County will total more than a half-million people; by 1980, 643,400; and by the year 2000, County residents will number 995,000.

The irrational unreality of apportionment in the General Assembly in the Senate and in the House of Delegates even under the temporary reapportionment exists not merely between those subdivisions of large and small population, but shows its purposelessness in subdivisions of comparative population and characteristics.

Charles and Dorchester Counties, ~~both on the Eastern shore~~, with respective populations of 32,572 and 29,666 have two delegates for the larger population and four for the smaller, at least until January 1, 1966, under temporary house reapportionment.

The table below speaks for itself.

TABLE 1. PRESENT REPRESENTATION IN MARYLAND LEGISLATURE ON BASIS OF 1960, U.S. CENSUS INCLUDING TEMPORARY REAPPORTIONMENT OF HOUSE OF DELEGATES

County	1960 Population	State Representation		No. of Persons Represented By Each	
		Senators	Delegates	Senators	Delegates
Allegany	84,169	1	6	84,169	14,028
Anne Arundel	206,634	1	7	206,634	34,439
Baltimore	492,428	1	13	492,428	82,071
Calvert	15,826	1	2	15,826	7,913
Caroline	19,462	1	2	19,462	9,731
Carroll	52,785	1	4	52,785	13,196
Cecil	48,408	1	3	48,408	16,136
Charles	32,572	1	2	32,572	16,286
Dorchester	29,666	1	4	29,666	7,416
Frederick	71,930	1	6	71,930	11,989
Garrett	20,420	1	3	20,420	6,806
Harford	76,722	1	4	76,722	19,181
Howard	36,152	1	2	36,152	18,076
Kent	15,481	1	2	15,481	7,741
Montgomery	340,928	1	10	340,928	56,821
Prince George's	357,395	1	10	357,395	59,566
Queen Anne's	16,569	1	2	16,569	8,285
St. Mary's	38,915	1	2	38,915	19,458
Somerset	19,623	1	3	19,623	6,541
Talbot	21,578	1	3	21,578	7,193
Washington	91,219	1	6	91,219	15,203
Wicomico	49,050	1	4	49,050	12,263
Worcester	23,733	1	3	23,733	7,911
CITY					
Baltimore	939,024	6	39	156,504	26,084
TOTALS	3,100,689	29	142		
STATE AVERAGE				106,920	25,209

Proportionately, no other political subdivision in the state has experienced the population growth of Montgomery County. By comparison, some of its sister jurisdictions in the state have enjoyed stable populations, far smaller than Montgomery's, but with identical representation. Allegany County with just over 84,000 people, has lost population since the 1950 census, while retaining the same voting authority in the Senate as Montgomery. In fact, until the temporary reapportioning of the House in 1962, Allegany County also had the same number of six delegates as Montgomery, and unless the temporary reapportionment is made permanent, the two counties will continue equal in House representation.

The vast change in the size and character of its population has brought the usually expected problems to Montgomery County: roads, schools, transportation, recreation areas, public services of every kind, housing, zoning, planning, preservation of natural resources, taxes, industrial development. The smaller-populated, largely agricultural counties have these problems in far lesser degree than the populous, complex, larger counties. The so-called smaller counties control the conduct of the General Assembly and will continue to control in the Senate.

The political protectivism forever granted state subdivisions with small populations in the Maryland Senate by reason of Section 2 of Article III, Maryland Constitution, presently will grant equally discriminatory favoritism to Baltimore City.

As outlined in detail in appellants' brief, Baltimore City is on a population basis represented by six state senators. From 1930 to 1950 the population of Baltimore City increased from 804,874 to 949,708. From

1950 to 1960, Baltimore's population *decreased* to 939,024, and such decline is predicted to continue. *Md. Population*, Md. Planning Dept., April, 1961, State Pub. No. 113.

From 1930 to 1950, the population of Montgomery County increased from 49,206 to 164,401. From 1950 to 1960 the County population increased by 176,527 to 340,928. *Md. Population, supra.* As of July 1, 1962, the estimated population is 383,000, increasing at a rate of 20,000 plus persons per year.

The trends are confidently predictable and the rate of increase of Baltimore County with 1960 population of 492,428 and Prince George's County, 357,395, are such that by the year 2000, or sooner, each of these counties, with Montgomery, will exceed Baltimore City in population.[1] Anne Arundel County (206,634) will not be far behind.

Each of these urban counties is presently condemned by the Maryland Constitution and the decision of the Court of Appeals upholding present Senate apportionment to immutable discrimination. Baltimore City with its six senators has, or shortly will have, as great a vested interest in continuing the present representation in the Senate as the less populous counties. The Senate will stand with four senators from the four largest counties with a majority of the state population against the interests of twenty-five senators from the rest of the state.

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[1] Baltimore County population forecasts are a minimum low of 750,000 and a maximum high of 850,000 by 1980. Office of Planning and Zoning, Baltimore County. Prince George's County population is estimated as 671,995 in 1980 and 1,460,404 in 2000 by the Maryland-National Capital Park and Planning Commission.

Constitutional representation under the 14th Amendment requires that the majority of the Senators speak for the majority of the citizens of the state. In the Senate of Maryland geography alone cannot be enough to satisfy the mandate of the 14th Amendment. There can be no sanctity in the theory of geographic apportionment within the states, since the application of the 14th Amendment is directly to the states. No Constitutional formula is expressed as to how the states shall apportion their legislatures, except as the 14th Amendment dictates equal protection of the laws. As Abraham Lincoln believed—and as certainly we and this Court must also believe—government is of, by, and for the people; it is not for mountains, sand, earth, or sea. Trees, valleys, and rivers are not governed, nor do they govern. The people must be the concern of government, and the greatest number of them must be given a proportionate share in the deliberations of their respresentative legislature. The malapportionment of the General Assembly effectively nullifies the democratic rights of the people of Montgomery County.

The majority opinion of the Maryland Court of Appeals finds that the counties of Maryland "[i]n the diversity of their interests and their local autonomy . . . are quite analogous to the states, in relation to the United States" and proceeds, with the aid of history, to uphold geographical Senate apportionment in Maryland. *The Daily Record, supra.* The court's adoption of the federal analogy is fallacious; counties possess no sovereignty, but are mere convenience creations of the state, for the specific purpose to exercise, within a limited sphere, the powers of the state. *Town Com'rs of Centreville* v. *County Com'rs of Queen Anne's County*, 199 Md. 652, 87 A. 2d 599 (1952); *Darling* v.

City of Baltimore, 51 Md. 1 (1879). The state may limit the powers of a municipal corporation (such as Montgomery County), as it sees fit, *Joseph R. Foard Co.* v. *State, use of Goralski*, 219 Fed. 827 (1914); *Mayor & City Council of Baltimore* v. *Baltimore Gas & Elec. Co.*, 221 Md. 94, 156 A. 2d 447 (1960), and a municipal corporation has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of the state, *Williams* v. *Mayor & City Council of Baltimore*, 289 U.S. 36 (1933). For the nature and powers of a county or municipal subdivision within Maryland, see also *Howard County Com'rs.* v. *Matthews*, 146 Md. 553, 127 Atl. 118 (1924); *Clauss* v. *Board of Education*, 181 Md. 513, 30 A. 2d 779 (1943); *Talbot County Com'rs.* v. *Queen Anne's County Com'rs.* 50 Md. 245 (1879); *Neuenschwander* v. *Washington Suburban Sanitary Comm.*, 187 Md. 67, 48 A. 2d 593 (1946); *Pumphrey* v. *City of Baltimore*, 47 Md. 145 (1877); *City of Hagerstown* v. *Sehner*, 37 Md. 180 (1872); *Jewel Tea Co.* v. *Town of Bel Air*, 172 Md. 536, 192 Atl. 417 (1937); *Rushe* v. *Town of Hyattsville*, 116 Md. 122, 81 Atl. 278 (1911); and *Ames* v. *Board of Supervisors of Elections of Montgomery County*, 195 Md. 543, 74 A. 2d 29 (1950).

The lower court's reliance on an analogy to the federal system is difficult to accept when the real relationship of the political bodies is considered. But even if a fair comparison could be made that the relationship of a county to its state today is not significantly different from the relationship of a state to the country, nevertheless it remains that that factor in no way should be controlling.

The guarantees of the 14th Amendment glare directly toward the state. No amount of nice comparison

or reasoning that Congressional apportionment works for the country and should for the state will reduce the glare that illuminates the inescapable message that the state must provide for its citizens a fair representation in the affairs of that state.

Appellants have made pointed argument with reference to judicial and other authority, and with special reference to conflicting decisions in the lower federal and state courts, to support Montgomery County's position that this Court should take jurisdiction of the instant appeal, and the County will not reiterate appellants' brief, save to say that it is clear that substantial and grave Constitutional issues are involved herein which are of paramount importance to the functioning of democratic state governments, especially that of Maryland.

When viewed as a whole, the General Assembly of Maryland still is malapportioned. The evidence, as borne out by the practical workings of the Assembly, is clear that the Maryland Senate is so grossly malapportioned as to work an obvious invidious discrimination against the people of the urban counties. Unless this Court acts to determine the Constitutionality of representation in the Maryland legislature, there is no possibility that three-fifths of the Senate will approve any further change in either the Senate or the House, nor will the state courts act, since the high court of Maryland has ruled Constitutional the representative formula of the Senate. The composition of the Senate will remain as now fixed without hope of change as populations grow and discrimination intensifies.

The history of Maryland's legislative action—or rather inaction—so indicates. The possibility of fair representation in the Maryland legislature as a whole

exists only if this Court accepts this appeal and acts to define the meaning of the 14th Amendment in the affairs of representative state government.

The likelihood of voluntary action by the General Assembly, where there is required a three-fifths majority to propose a constitutional amendment, to reapportion the Senate is diminishing, not advancing.

Former inaction is forever inaction unless this Court takes jurisdiction of this cause to determine whether or not Section 2 of Art. III of the Maryland Constitution is invalid as a denial of equal protection of the law under the 14th Amendment of the U. S. Constitution. No other relief, legislative or judicial is available.

CONCLUSION

For the reasons discussed above, Montgomery County respectfully urges that this Court take jurisdiction of this appeal and set this case for briefing and argument on the merits.

Respectfully submitted,

ALFRED H. CARTER
County Attorney

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

County Office Building
Rockville, Maryland

Attorneys for Montgomery County, Maryland

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. [redacted] 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

v.

J. MILLARD TAWES, GOVERNOR, ET AL.,
Appellees.

MOTION TO DISMISS OR AFFIRM

THOMAS B. FINAN,
Attorney General of Maryland,

JOSEPH S. KAUFMAN,
Deputy Attorney General of Maryland,
Suite 1201, 10 Light Street,
Baltimore 2, Md.,
For Appellees.

The Daily Record Co., Baltimore 3, Md.

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IN THE

Supreme Court of the United States

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No. ------

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,

Appellants,

v.

J. MILLARD TAWES, GOVERNOR, ET AL.,

Appellees.

MOTION TO DISMISS OR AFFIRM

Appellees, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, move to dismiss or affirm on the ground that this appeal does not present the question sought to be reviewed or a substantial Federal question.

STATEMENT

This is an appeal from a decision of the Court of Appeals of Maryland affirming a decree of the Circuit Court for Anne Arundel County, which found Section 2 of Article III of the Maryland Constitution, dealing with membership in the Maryland Senate, to be constitutional and not in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

On April 25, 1962, the Court of Appeals of Maryland, following the decision in *Baker v. Carr*, 369 U.S. 186, held that a justiciable question was presented by the Appellants' Bill of Complaint, and remanded the cause with instructions for further consideration by the Circuit Court for Anne Arundel County. On May 24, 1962, the Circuit Court for Anne Arundel County, pursuant to the instructions contained in the order of the Court of Appeals of Maryland, filed an opinion in which it was held that Section 5 of Article III of the Maryland Constitution, relating to representation of the Maryland House of Delegates, violated the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States insofar as it applied to the election of November, 1962. The court reserved the question as to whether Section 2 of Article III, relating to membership in the Maryland Senate, was unconstitutional.

The General Assembly of Maryland was convened in extraordinary session on May 25, 1962 by virtue of a proclamation of the Governor, and on May 31, 1962, the General Assembly passed, and the Governor approved, Chapter 1 of the Special Session of 1962, which legislation added nineteen seats to the House of Delegates, to be elected at the November 6, 1962, General Election, which seats were distributed among the more populous counties and Baltimore City.

An appeal was entered to the Court of Appeals of Maryland from the order of the Circuit Court for Anne Arundel County complaining of the failure of the Circuit Court to make an express finding on the composition of the Maryland Senate. The Court of Appeals of Maryland, by its order of June 8, 1962, remanded the case to the Circuit Court for Anne Arundel County with instructions to determine this issue.

On June 28, 1962, the Circuit Court for Anne Arundel County issued a decree and filed an opinion holding that the present composition of the Maryland Senate was valid and constitutional. From this decree, an appeal was taken to the Court of Appeals of Maryland and the case was heard in a special session of the Court on July 23, 1962. Following argument, the Court of Appeals affirmed by a *per curiam* order the decree of the Circuit Court for Anne Arundel County. On September 25, 1962, the Court of Appeals filed its opinion with three dissents incorporated into two dissenting opinions.

The gravamen of Appellants' claim is set forth in Paragraph 22 of the Bill of Complaint, which states as follows:

> "Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince Georges and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 senators.)"

In the trial court, the Appellants conceded that after the reapportionment of the House of Delegates as a result of the action of the Special Session of the General Assembly, the House was legally reapportioned as to population (See Judge Duckett's Supplemental Opinion, page 16 of Jurisdictional Statement). The only issue presented therefore was whether the Senate of Maryland must, in order to comply with the Fourteenth Amendment, be based also on population.[1]

[1] In Appellants' Supplemental Memorandum filed in the Circuit Court for Anne Arundel County Appellants said: "The issue as to the alleged unconstitutionality of former Section 5 of Article III of

QUESTION PRESENTED

Does the Fourteenth Amendment and Constitution of the United States REQUIRE that the membership of both houses in a bicameral legislature, such as the General Assembly of Maryland, be "based on, or reasonably related to, the present population" of the various political subdivisions of the State?

STATEMENT OF HISTORICAL FACTS

The General Assembly of Maryland, from its inception, has been composed of two houses, each of which was designed to represent different segments or ideologies present in the State. Article III, Section 1 of the Maryland Constitution embodies this principle and states:

> "The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland".

By the Constitution of 1776, the House of Delegates was comprised of four Delegates from each county, plus two from Annapolis and Baltimore Town (then a part of Baltimore County). By contrast, the Senate of Maryland was composed of fifteen Senators, six from the Eastern Shore and nine from the Western Shore, chosen by an electoral college consisting of forty members. Each county supplied two electors, and Annapolis and Baltimore Town were allotted one each.

Subsequently, by Chapter 197 of the Acts of 1836, ratified by the electorate in 1837, the Senate was reconstituted to consist of one Senator from each county and one from

---

the Maryland Constitution (relating to the composition of the House of Delegates) therefore now seems moot, at least until 1966" (Parentheses supplied).

Baltimore Town. The method of indirect election by the electoral college was then abandoned.

The Constitution of 1851, and each succeeding Constitution, provided for members in the House of Delegates to be based generally on a population ratio. It provided that each county should be allotted representation based on the census of 1860 and each succeeding Federal census, subject, however, to the provision that no county should have less than two Delegates. Similarly, the Constitution of 1864 apportioned the House of Delegates on the basis of population with one Delegate for the first 5,000 persons, and thereafter each Delegate to represent a graduated scale of population.

The Constitution of 1867 allotted seats in the House of Delegates based upon a graduated scale of population, permitting, however, the guaranteed minimum of two Delegates to each county or legislative district of Baltimore City, regardless of population.

In 1949 the General Assembly "froze" membership in the House of Delegates based upon the 1940 census in order to halt a growing inequity in the House because of the fact that the larger counties had reached their maximum representation under the graduated scale as set forth in the Constitution of 1867, while the smaller counties were still gaining seats.

By contrast, the Senate of Maryland, in the Constitution of 1851 and as continued by the Constitutions of 1864 and 1867, each county was granted one seat. However, Baltimore City, which in 1851 had achieved the status of a political subdivision independent of Baltimore County, was thereafter by the Constitution of 1864 allotted three Senators, one from each legislative district, which provision continued in the Constitution of 1867. In 1900,

Baltimore City received an additional legislative district and Senator, and two more in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County, pursuant to the provisions of Chapter 82 of the Acts of 1918.

ARGUMENT

The Appellants by their Bill of Complaint, their brief in the Court of Appeals of Maryland and in their Jurisdictional Statement filed in this Court based the thrust of their argument upon the proposition that the Fourteenth Amendment *requires* that the composition of both houses of the Maryland Legislature be based upon or reasonably related to the present population of the various political subdivisions of this State. It is respectfully submitted that this argument is doctrinaire and that the Fourteenth Amendment does not require any state to adopt any system of membership in its legislative body, provided there is no denial of equal protection of the laws.

This Court, in 1948, in *MacDougall v. Green*, 335 U.S. 281, clearly stated the law as follows:

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former. The Constitution — a practical instrument of government — makes no such demands on the State. * * *".

Mr. Justice Douglas, concurring in *Baker v. Carr*, 369 U.S. 186, stated at Pages 244-245:

> "The traditional test under the Equal Protection Clause has been whether a State has made 'an invidious discrimination,' as it does when it selects 'a particular race or nationality for oppressive treatment.' See *Skinner v. Oklahoma*, 316 U.S. 535, 541. Universal equality is not the test; there is room for weighting. As we stated in *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 'The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' "

And Mr. Justice Stewart, in his concurring opinion in *Baker v. Carr, supra*, Pages 265-266, stated:

> "The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary — without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother HARLAN, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter.' *Post*, p. . The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper, and customs of its people.' *Post*, p. . And contrary to the suggestion of my Brother DOUGLAS, the Court most assuredly does not decide the question, 'may a State weight the vote of one county or one district more heavily than it weights the vote in another?' *Ante*, p.
>
> "In *MacDougall v. Green*, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities

> for exerting their political weight at the polls not available to the former.' 335 U.S., at 284. In case after case arising under the Equal Protection Clause the Court has said what it said again only last Term — that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others.' *McGowan v. Maryland*, 366 U.S. 420, 425. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it.' *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 584."

It is clear that this Court has consistently ruled that political power is not a function exclusively of numbers, since this disregards practicalities of government. The States have exercised wide latitude as to the composition of their legislatures. Historically, the claim of political subdivisions to representation regardless of size has been an important reason for departing from the rule of apportionment according to population. From our earliest history, the town or county was often the dominant unit of government, and colonial assemblies and their successors, the State legislatures, were composed of representatives of these entities. Since it was the town or county that was being represented in a very real sense, it has been natural to guarantee each unit at least one representative in one and many times in both, of the branches of the legislature. Such provisions prevail in the constitutions of approximately twenty-seven states. In fact, in only fourteen states do the constitutions provide for periodic legislative reapportionment of *both* houses by a substantially unqualified application of the population standard.[2]

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[2] Colorado, Indiana, Kentucky, Massachusetts, Minnesota, Nebraska (unicameral legislature), North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Virginia, Washington and Wisconsin.

The Federal Constitution itself contains a similar compromise between the claims of the States and direct representation of the people. Many factors have been considered. For example, in New Hampshire, seats in the Senate are apportioned according to a ratio of direct taxes paid. In Connecticut representation in one house is based upon representation of towns and not in any way based upon population.

The reason for such constitutional State-craft involves a degree of protection for minorities which limits the principle of majority rule. Perfect numerical equality of voting rights is achieved only if the entire state legislature were elected at large, but with such a plan there is great danger that the remote and less populated sections would be neglected, and in the event of a conflict between various parts of the state, the more populous region could elect the entire legislature and the minority would never be heard in its councils.

The Appellants at several places in their Jurisdictional Statement stress the fact that 15% of the population of Maryland elected a majority of the Maryland Senate. From this, they assume that the Senate is controlled, in fact, by the action of a minority of the people, which has and continues to thwart legislation introduced in the General Assembly for the welfare of the majority. Appellants lose sight of the practicalities of government when they make such an allegation. There is no proof or showing that the so-called "rural representatives" vote as a unit or block, disregarding party affiliation, their views whether liberal or conservative, or the will of their constituents. Appellants further lose sight of the fact that according to the 1960 census the twenty-six least populated states have a population of approximately 31,000,000, which represents 17%

of the population of the United States, and yet these states have 52% of the representation in the United States Senate. It has never been urged that the least populated states vote as a block and disregard party, economic, philosophic and other considerations in passing upon legislative proposals. Actions in the Maryland Senate, just as in the United States Senate, are not motivated by rural versus urban arguments, but are motivated by other factors, including party, economic, social and political philosophy of the members of those legislative bodies. In the General Assembly of Maryland, as in the Congress of the United States, the delegations from many counties are divided by party and there is no unanimity among those delegations. Thus, in Maryland, the legislative delegations from several of the counties, both rural and urban, are divided between the Republicans and Democrats so that there is no uniform action for the counties insofar as party is concerned. The arguments made by the Appellants of control by a minority are neither supported by the record nor are they supported in fact or theory. To require that each house of the General Assembly of Maryland be elected by a system of population proportions, as now urged, would substantially defeat the reasons for a bicameral legislature, particularly where the terms and qualifications of the members of both houses are virtually the same.

The Maryland system of representation, like that of the Congress of the United States, is a hybrid, a system recognizing representation of lesser governmental units in one house and representation based on population in the other. (See James Madison in the Federalist, No. 62.)

Can it be said that the Fourteenth Amendment to the Constitution extracts from the States a higher or different standard regarding representation in the state legislatures

than it does upon the Federal Government? The Appellants' attempt to distinguish the Maryland legislative structure from that of the United States upon the ground that the Federal unit joins sovereign states, while Maryland is a unitary State. It is respectfully stated that this argument is merely an exercise in semantics.

As previously pointed out, in our colonies local subdivisions, such as towns or counties, rather than approximately equal population units, were the dominant units of government. The colonial assembly was composed of representatives from these units without regard to the population of the town or county. Notwithstanding the foregoing, at least since the adoption of the Constitution of the United States in 1789, the States have relinquished their "sovereignty" in the traditional sense of the word. In fact, some thirty-seven of the states have been admitted to the Union since the Constitution was originally adopted, and with the possible exception of Texas, none of these states ever enjoyed true or external sovereignty.[3]

It is an interesting historical fact that the mode of selecting the members of the United States Senate was modeled to a considerable extent upon the Maryland Senate, as created by the Constitution of 1776. In commenting upon the composition, election and tenure of the Maryland Senate, James Madison in the Federalist, No. 63, stated:

> "* * * and the Maryland Constitution is daily deriving from the salutary operations of this part of it (functions of the Maryland Senate), a reputation in which it will probably not be rivalled by that of any state in the union." (Parentheses supplied.)

[3] The two most recent additions — Alaska and Hawaii — have constitutions containing provisions for senatorial districts of marked inequality in population.

POST — BAKER V. CARR

Mr. Justice Harlan, in his dissenting opinion in *Baker v. Carr, supra,* pointed out that the Court was permitting "an adventure in judicial experimentation", and it appears that the various cases decided subsequent to that landmark decision justified his conclusion.

On April 14, 1962, the United States District Court for the Middle District of Alabama (Northern Division), in *Sims v. Frink*, 205 F. Supp. 245, considered the failure of the Alabama legislature to reapportion both of its houses in accordance with the Alabama constitutional mandate that there should be a reapportionment after each decennial census and that the legislature shall be apportioned according to population, provided that each county shall have at least one representative in the house. In regard to the senate, a fixed number of senators is designated and the state is to be divided into senatorial districts which are to be based upon population. The court ordered the Alabama legislature to comply with its own constitutional mandate and deferred further action. Subsequently, on the 21st day of July, 1962 (208 F. Supp. 431), the court considered the reapportionment legislation passed by the special session and found that the new statutes did not fully remedy the existing evil. The court thus carefully stated:

> "* * * Indeed, as has also been observed, it is the policy and theme of the Alabama Constitution to require representation according to population in both Houses as nearly as may be, while still complying with more detailed provisions. So long as only extremely partial representation according to population can be achieved in the House, we do not believe that the principle of representation according to population can be completely abandoned in the Senate, as would be done under the '67-Senator Amendment.' The pro-

> vision that the Senate shall consist of a senator from each of the 67 counties, in our opinion, in the light of the other provisions of the Alabama Constitution governing representation in the Legislature, would result in invidious discrimination and a denial of the equal protection of the laws. * * *".

Two cases were decided by the United States District Court for Georgia which attempted to establish standards and guideposts for determining "invidious discrimination" in apportionment. In the first, decided on April 28, 1962, was *Sanders v. Gray*, 203 F. Supp. 158 (N.D. Ga.), the court invalidated the long-established county unit voting system in that State's primaries. The court, however, applied several tests and, following the rationale of *MacDougall v. Green*, *supra*, said:

> "We make the test on a consideration of all relevant factors, and these include rationality of state policy. See the concurring opinion of Mr. Justice Clark in *Baker v. Carr* where the dismissal of the appeal in *South v. Peters*, supra, was said to reflect the viewpoint of the Supreme Court 'to refrain from intervening where there is some rational policy behind the State's system.'
>
> "Another test is whether or not the system is arbitrary. The right of plaintiff in this connection depends upon the treatment accorded his unit. His unit, Fulton County, must be related to the state as a whole in measuring his right, and his right is the same as that of all other Democrats in his unit. The fact that Echols or some other small county receives more than its share is of no concern to Fulton County so long as it is accorded proper treatment. And the consideration of this factor includes the applicability of the diffusion principle — the right of a state to properly diffuse political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities

for asserting their political weight at the polls not available to the former. The Constitution — a practical instrument of government — makes no such demand on the states.' *MacDougall v. Green*, supra, at page 284. We have considered too the genesis of the System, whether or not it was for a fair purpose in the beginning — that it was is self-evident from the history heretofore set out.

"Another important factor to be considered in making the test is whether or not the unit system has a historical basis in our political institutions, both federal and state. * * *".

In *Toombs v. Fortson*, 205 F. Supp. 248, the United States District Court for the Northern District of Georgia found that the apportionment of the Georgia legislature presented an invidious discrimination and, therefore, was unconstitutional. The court clearly stated, however, at page 257:

"* * * we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population."

Subsequently, the court considered a proposed constitutional amendment under which the Georgia senate would be apportioned according to population, while the composition of the house of representatives would allow one member from each of the state counties. The majority of the United States District Court found this arrangement to be constitutional, since it followed the basic structure of the United States Congress, and ruled that there was no invidious discrimination. See *Toombs v. Fortson*, . F. Supp. . Northern District of Georgia, September 5, 1962.

Also enlightening is *Caesar v. Williams*, 371 P. 2d 241 (Idaho), decided on April 3, 1962. As in the case at bar,

the Appellants contended that since the apportionment statutes did not provide for substantially equal representation in the two houses for residents of the more populous counties, the statutes violated both the State and Federal Constitutions. The court concluded that the Idaho constitutional provision, which permitted representation to be based on other than a numerical basis, was not unconstitutional or in violation of the Fourteenth Amendment.

This Court, in *W.M.C.A., Inc. v. Simon*, 370 U.S. 190, remanded to the United States District Court for the Southern District of New York proceedings to determine the question on the merits without the question of justiciability hanging over the decision. Thereafter, the District Court (208 F. Supp. 368) dismissed the complaint and found that the New York provisions governing the apportionment of the senate and assembly districts were not unconstitutional, and also that the system providing senatorial districts was neither irrational nor arbitrary. The court, after reviewing the historical basis, stated as follows at page 379:

> "As already indicated geography, accessibility, a proper diffusion of political initiative as between a state's thinly populated counties and those having concentrated masses, have not been cast out as proper factors in apportionment methods."

Also of interest is *Sobel v. Adams*, 208 F. Supp. 316, which considered the new apportionment action of the Florida state legislature. In Florida, even under the new apportionment, a disparity exists between the more populous and the less populous areas. It is important to note that in Florida, as in Maryland (with the exception of the Maryland counties of Montgomery and Baltimore), the legislature is the local law-making body for the counties. The enactment of local acts is procured by the legislative

delegations from the areas affected, and are not of general consequence to the state as a whole. The court there found that this phase of the exercise of state sovereignty could not be adequately carried out if a substantial number of the less populous counties of the state were deprived of representation in the legislature. It was also found that notwithstanding some inequities, the forming of the senatorial districts was proper even though population was not the dominant factor in determining the arrangement of senatorial districts.

Also of importance is the case of *Scholle v. Hare*, 369 U.S. 420, which was remanded to the Supreme Court of Michigan for a determination on the merits of the question there presented. The majority of the Michigan court (116 N.W. 2d 350) found that there was no formula to explain the division or grouping of counties and parts of counties into senatorial districts, and for that reason there was no rational basis for the classification involved and, therefore, it was irrational and arbitrary. We respectfully submit that the Michigan case is substantially distinguishable from the case at bar since in that case there was no attempt to grant representation to lesser governmental units, such as counties or towns, but merely an arbitrary and irrational division of the state without regard to any standard. Significantly, Mr. Justice Stewart has stayed the effect of the Michigan court's order pending further review by this Court.

Following the decision of this Court in *Baker v. Carr*, *supra*, the District Court for the Middle District of Tennessee, on June 22, 1962, reviewed and considered reapportionment legislation passed at a special session of the Tennessee legislature. In that case (206 F. Supp. 341), the court found that the reapportionment legislation only par-

tially eliminated the inequity in that the reapportioning of the senate of Tennessee was utterly arbitrary and lacking in rationality. The court, however, retained jurisdiction to allow the 1963 general assembly to cure this defect.

CONCLUSION

It is respectfully submitted to the Court that there was, as the Opinion of the Court of Appeals of Maryland indicates:

1. Rationality of State policy in the composition of the Maryland Senate, and there has been no showing that the system is arbitrary.

2. That there is, and has been, a historical basis for the system of allowing representation of lesser political subdivisions of the State and, in fact, the Maryland system substantially resembles the system adopted by the Founding Fathers in the establishment of the Congress of the United States.

3. That geography is an important element in determining a proper composition of political initiative between the State's thinly populated counties and those having concentrated masses.

In addition, we believe that this Court should not under any circumstances overcome the presumption of constitutionality of a state's constitutional provisions unless the alleged violation of constitutional rights is clear. It is respectfully submitted that there has been no clear showing of a violation of constitutional rights, and that it is within the province of the General Assembly of Maryland and the people of Maryland to determine the wisdom or

practicality of the system adopted by the people, and not a matter for the courts to decide.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of
Maryland,

JOSEPH S. KAUFMAN,
Deputy Attorney General of
Maryland,

For Appellees.

SUPREME COURT, U. S.

Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants,*

vs.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees.*

BRIEF FOR APPELLANTS ON APPEAL FROM THE COURT OF APPEALS FOR MARYLAND

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.

JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D. C.
Of Counsel.

JOHNSON BOWIE,
22 West Pennsylvania Ave.,
Towson 4, Maryland.
Attorneys for the Appellants.

August 22, 1963

IN THE

SUPREME COURT OF THE UNITED STATES

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION (in behalf of its members), 4907 Redford Road, Bethesda, Montgomery County, Md.; W. F. STRONG, 301 Hillmoor Drive, Silver Spring, Montgomery County, Md.; NEWTON I. STEERS, 6601 River Road, Bethesda, Montgomery County, Md.; JOHN DOHERTY, 12 Revell Street, Annapolis, Anne Arundel County, Md.; BRUCE L. BOWMAN, 1423 Laurel Hill Road, Greenbelt, Prince Georges County, Md.; ANDREW M. BRISTOW, 8168 Glen Gary Road, Baltimore County, Md.; and SAMUEL HOPKINS, 4302 Wendover Road, Baltimore, Md., *Appellants*,

vs.

J. MILLARD TAWES, Governor, State House, Annapolis, Md.; BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LLOYD SIMPKINS, Secretary of State and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; LOUIS L. GOLDSTEIN, Comptroller and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; THOMAS B. FINAN, Attorney General and Member of the BOARD OF STATE CANVASSERS, State House, Annapolis, Md.; HOOPER S. MILES, Treasurer and member of the BOARD OF STATE CANVASSERS, State Office Building, Annapolis, Md.; and JAMES LLOYD YOUNG, Clerk, Court of Appeals, and member of the BOARD OF STATE CANVASSERS, Court of Appeals Building, Annapolis, Md.; and BOARD OF ELECTION SUPERVISORS, Anne Arundel County, Court House, Annapolis, Md., *Appellees.*

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*,

vs.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*.

BRIEF FOR APPELLANTS

Opinions Below

The first pertinent opinion of the Circuit Court for Anne Arundel County, Maryland is unofficially reported in *The Daily Record* (Baltimore), May 28, 1962, p. 1, and is printed at R. 100. A second opinion of the same court is unofficially reported in *The Daily Record* (Baltimore), July 2, 1962, p. 3, and is printed at R. 113. An earlier opinion of the Court of Appeals for Maryland in this case, issued on April 25, 1962, is reported at 228 Md. 412, 180 A. 2d 656. The decision of the Circuit Court of Appeals for Maryland from which this appeal has been taken is reported at 229 Md. 406, 184 A. 2d 715, and is printed at R. 162.

Jurisdiction

The judgment of the Court of Appeals for Maryland initially was entered on July 23, 1962 in the form of a *per curiam* order, with three of seven judges dissenting (R. 124), 229 Md. 317, 182 A. 2d 877. A timely motion for reargument was denied, without opinion, on September 11, 1962 (R. 125). The majority and dissenting opinions of the Court of Appeals for Maryland were issued on September 25, 1962 (R. 162). A notice of appeal was filed on September 28, 1962 (R. 193), and the appeal was docketed on October 24, 1962. This Court noted probable jurisdiction on June 10, 1963, 374 U.S. 804. Jurisdiction of the Court rests on 28 U.S.C. 1257(2) and 28 U.S.C. 2101(e).

Statutes and Constitutional Provisions Involved

This case involves:

(1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, containing the equal protection and due process clauses, which are printed in Appendix A, *infra*, p. 76.

(2) Section 2, and former Section 5, of Article III of the Maryland Constitution, which are printed in Appendix A, *infra*, p. 76.

(3) Chapter 1, Acts of the 1962 Special Session of the Maryland General Assembly, approved May 31, 1962, and now found as Article 40, Section 42, Code of Maryland (1962 Supp.), which is printed in Appendix A, *infra*, p. 77.

Questions Presented

1. Are the appellants and other citizens and eligible voters who reside in the five most populous subdivisions of the State of Maryland being subjected to invidious discrimination and unreasonable dilution in the exercise of their

rights of suffrage, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States, through the representation afforded them in the Maryland General Assembly by Section 2 of Article III of the Maryland Constitution, which provision allows the five most populous political subdivisions, containing 76% of the population of Maryland, only 34% of the total membership of the State Senate, and permits a minority of 14% of the population of the State residing in the less populous political subdivisions thereof to elect a majority of the members of the Maryland State Senate?

2. Are equal protection and due process of law, as guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, being denied appellants and other citizens and voters of Maryland similarly situated, by the total representation now provided for in both Houses of the Maryland General Assembly, and under which citizens residing in the five most populous political subdivisions of the State, comprising 76% of Maryland's population, by virtue of Article 40, Section 42, of the Maryland Code and Section 2, Article III, of the Maryland Constitution, are afforded only 55% and 34%, respectively, of the present membership of the Maryland House of Delegates and State Senate, with 35% of the population in a position to elect a majority of the House of Delegates and, as stated above, 14% able to elect a majority of the State Senate?

Statement of the Case

The appellees first demurred to the allegations of the bill of complaint after it was filed in August, 1960 (R. 50-52). In its first decision in this case, the Court of Appeals for Maryland reversed the trial court's overruling of the demurrers. 228 Md. 412, 180 A. 2d 656. Appellees' subsequent answers raised no disputed questions of material fact (R. 89-95). Following appellants' motion for sum-

mary judgment (R. 98), the case was decided by the trial court exclusively upon the pleadings and exhibits filed and argument of counsel, without the taking of testimony or the introduction of further evidence. The facts are these:

1. *Present Population of the State and Existing Representation in the Maryland General Assembly.* According to the official census, the 1960 population of Maryland was 3,100,689 (R. 97). At that time, the combined population of the five most populous political subdivisions of Maryland, which are the Counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, and the City of Baltimore, was 2,336,409. At present, about 76% of the population of Maryland live in these five most populous political subdivisions, while approximately 24% of the population reside in the remaining 19 counties of the State (R. 189).[1]

Under Section 2 of Article III of the Maryland Constitution, each of the 23 counties of the State is given one Senator, with each of the 6 legislative districts of the City of Baltimore also entitled to one Senator. Until the Circuit Court for Anne Arundel County declared it to be in violation of the Fourteenth Amendment and null and void, Section 5 of Article III of the Maryland Constitution had prescribed the representation to be enjoyed in the House of Delegates by the various political subdivisions. The specific number of Delegates to which each political subdivision was entitled was expressly set forth in that section of the Maryland Constitution. Temporary legislation passed at a special session of the Maryland General Assembly held in May, 1962, has replaced the voided Con-

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[1] More recent official estimates place Maryland's population, as of July 1, 1961, at 3,191,000. *Current Population Reports*, Bureau of the Census, November 26, 1962, No. 259, p. 3. By 1970, it has been predicted, Maryland will have a population of 3,838,000, nearly 79% of whom will live in the present five most populous political subdivisions. *Maryland Population Forecasts, 1965 and 1970*, published by Md. State Planning Dept., November 1961, pp. 3, 7, 9, 11, 35, and 37.

stitutional provision. Art. 40, Sec. 42, Code of Md. (1963 Supp.), App. A, *infra*, p. 77. Representation in the House of Delegates now is expressly provided for in the statute which was enacted at the special session. The representation prescribed by the present statute has remained as previously authorized by Section 5 of Article III of the State Constitution, with the following exceptions: Baltimore County now has 13 instead of 6 Delegates; Montgomery and Prince Georges now have 10 Delegates each instead of 6 each; Anne Arundel County now has 7 instead of 6 Delegates; and the Third Legislative District of the City of Baltimore now has been given 8 Delegates and the Fifth Legislative District, 7 Delegates, rather than the 6 Delegates to which each of those two Districts formerly had been entitled under Section 5 of Article III of the State Constitution (App. A, *infra*, p. 76).

The four most populous counties and the six legislative districts of the City of Baltimore have one member each in the Maryland State Senate. This constitutes approximately 34% of the representation in the Senate (R. 189). The remaining 19 counties have one member each, or approximately 66% of the representation provided for in the upper chamber of Maryland. Prior to the filing of this suit, and until the enactment on May 31, 1962 of temporary reapportionment legislation at a special session of the General Assembly, the five most populous subdivisions of the State were allotted 60 Delegates, out of the 123 members of the House of Delegates. The 19 less populous counties were given 63 Delegates, or 51% of the total membership of the House of Delegates. At the present time, the five most populous political subdivisions are afforded 79 Delegates, or 55% of the total membership of the House of Delegates, while the remaining less populous counties continue to have 63 Delegates, which now make up 45% of the total membership of 142.

2. *Disparities of Representation in the Maryland State Senate.* Less than 15% of the population of Maryland can elect a majority of the State Senate. One Senator from Baltimore County, with a population at the present time of about 500,000 people (R. 189), is elected by more people than are required to elect a majority of the entire State Senate. If representation was based strictly on the 1960 population of Maryland, each Senator would represent approximately 106,000 people. On that basis, a citizen's vote for a State Senator in the most under-represented populous county of Maryland is worth only 3% of the vote of a resident from the most over-represented and least populous county (R. 189).

The four most populous counties, with a combined population now approximating 1,500,000, and constituting over 45% of the total population of the State, enjoy only 14% of the representation now provided in the State Senate by virtue of Section 2 of Article III of the Maryland Constitution (R. 189). As of January 1, 1964, population projections indicate that Montgomery and Prince Georges Counties will have a combined population of 850,000, or 25% of the State total, yet will have only 7% of the total representation in the Senate.[2] The City of Baltimore, with a little over 900,000 people, has 6 State Senators, while the four most populous counties previously referred to, with nearly 1,500,000 people, have a combined total of 4. Substantial disparities in Senate representation also exist within the class of the less populous political subdivisions. For example, one county with a 1960 population slightly

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[2] The research director of the Urban Land League recently predicted that by 1970, metropolitan Washington, including Montgomery and Prince Georges Counties, will have a population of 2,725,000, and by 1980 a population of 3,500,000. *Washington Post & Times Herald*, June 30, 1963, p. A-1. As of January 1, 1963, Montgomery's population had almost reached 390,000, while that of Prince Georges was just a few hundred short of 425,000. *Washington Evening Star*, August 11, 1963, p. B-3.

in excess of 90,000 people has 1 State Senator, while another county with a population of less than 17,000 also has 1 (R. 189). The Senator from Montgomery County represents more than 22 times as many persons as the Senator from Kent County. Each year the population of Montgomery County is increasing by more than the entire present population of Kent County. Latest projections by the United States Census Bureau indicate that Montgomery County's population will reach 695,000 in 1980. This would represent an increase of 354,704 over that county's 1960 population. *Bethesda-Chevy Chase Tribune*, August 2, 1963, p. 1. Kent's 1960 population was 15,317.

3. *Present Representation in the House of Delegates.* Immediately after a decision rendered on May 24, 1962 by the Circuit Court for Anne Arundel County, declaring Section 5 of Article III of the Maryland Constitution to be in violation of the Fourteenth Amendment, a special session of the General Assembly of Maryland was convened. On May 31, 1962, the special session passed temporary, "stop-gap" legislation, adding 19 new Delegates to the House of Delegates, temporarily raising its membership to 142.[3] As stated, Baltimore County was allotted 7 of the new Delegates, Montgomery County and Prince Georges, 4 each, Anne Arundel County, 1, the Third Legislative District of the City of Baltimore, 2, and the Fifth Legislative District, 1 additional Delegate. Before the enactment of this special legislation, the maximum dilution in voting rights which had existed among the political subdivisions in the House of Delegates was approximately 12 to 1. This maximum has now been reduced to 6 to 1.

[3] Art. 40, Sec. 42, Code of Md. (1962 Supp.). Unless superseded by an amendment to the Maryland Constitution, the temporary legislation enacted by the special session will automatically expire on January 1, 1966. (App. A, *infra*, p. 86). An amendment requires that three-fifths (3/5ths) of each house of the General Assembly approve the referendum before it can be submitted for a vote of the electorate. Art. XIV, Sec. 1 of the Maryland Constitution.

The five most populous political subdivisions, in which 76% of the population live, at present have 55% of the total representation in the House of Delegates. Unlike the United States House of Representatives, where only 5 out of 436 Congressional seats, or 1%, fail to meet the minimum average population requirement, some 33, or 23%, of the total of 142 seats in the House of Delegates are allotted the less populous political subdivisions apart from the 30 seats to which they are entitled on a straight population basis. On any basis of a minimum population ratio requirement, these areas would not be entitled to those additional 33 Delegates.

The four suburban counties, with approximately 45% of the State's population, are given about 28% of the representation in the present 142 member House of Delegates. If representation were based on population, but permitting at least one Delegate for every County, the five most populous subdivisions would be entitled to 105 Delegates out of the 142 for which provision was made by the Act of May 31, 1962, rather than the 79 seats they now have. The 19 less populous counties, on the other hand, would be entitled to no more than 37 Delegates, rather than the 63 which they now have.

If the ten Delegates to which Montgomery County is entitled in the House of Delegates were subtracted from the 79 seats now held by representatives of the five most populous areas, the result would be that political subdivisions containing 35% of the population of Maryland could elect 73 of the 142 members of the House of Delegates, while a minority of 69 seats in that House would be elected by political subdivisions containing 65% of the State's population.

4. *Revenues Contributed and State Funds Returned.* In Maryland, significant portions of the revenue collected by the State from various types of taxes are returned to the

local political subdivisions on the basis of equalization formulae enacted by the General Assembly (R. 7, 23). Under most of these formulae, the five most populous political subdivisions contribute proportionately greater tax revenues, yet receive proportionately less funds back from the State, than do the less populous political subdivisions. For example, in 1959 under the equalization formula controlling the return of funds collected through the motor vehicle fuel tax, Anne Arundel, Baltimore, Montgomery and Prince Georges Counties, in which approximately 47% of the motor vehicles of Maryland are registered, received back approximately 12% of this revenue returned by the State (R. 7).

For the fiscal year which ended on June 30, 1959, Anne Arundel, Baltimore, Montgomery and Prince Georges County and the City of Baltimore contributed 84% of the Maryland income tax collected (R. 7). These political subdivisions, during that same year, also paid in 73% of the sales and use taxes, 83% of the corporation finance tax, and 70% of the business license revenue collected (R. 7). The same four counties, along with the City of Baltimore, also provided 72.4% of the revenue derived in 1959 from motor vehicle registration fees (R. 7).

5. *Futile Efforts to Have the Legislature Reapportion Itself in the Absence of a Controlling Court Decision.* Neither in the Maryland Constitution nor in the statutes is there any provision for reapportioning the General Assembly. The Maryland Constitution does not provide for the initiative. For an amendment to the State Constitution to be submitted to the people on referendum, a vote of three-fifths of both houses of the legislature is first required.[4] Aside from the limited and temporary reapportionment of the House of Delegates enacted at the 1962

[4] Art. XIV, Section 1, of the Maryland Constitution.

special session, following the decision of the trial court in striking down Section 5 of Article III of the Maryland Constitution, since 1867 all efforts to obtain a substantial reapportionment of the General Assembly, with two other exceptions, have been futile. In 1900, the City of Baltimore, because of its expanding population, was given an additional State Senator and an additional legislative district, making a total of 4 Senators and legislative districts; 2 more Senators and 2 more legislative districts were added to Baltimore's representation in 1922.[5] Apart from these increases of Senate representation for the City of Baltimore, membership in the Maryland State Senate remains as provided for in the Constitution of 1867. Until 19 Delegate seats were created and distributed among the five most populous political subdivisions at the 1962 special session of the Maryland General Assembly, representation in the House of Delegates was authorized on the basis of a limited population formula adopted in the Constitution of 1867. However, a ceiling was imposed in 1950 which froze representation in the lower House on the basis of representation established in reliance on the Federal census of 1940. The purpose of this amendment was to prevent the smaller counties from continuing to receive increased representation at the further expense of the larger political subdivisions which, under the 1867 formula, were not entitled to any more than 6 Delegates once their population had reached 55,000, no matter how much it might increase thereafter. 228 Md. 412, 435, *f.n.* 11, 180 A.2d 656, 669, *f.n.* 11.

From 1951 through 1960, 11 proposals were introduced in the Maryland General Assembly to reapportion only the House of Delegates. None were enacted. Nor did any move so far as to reach a final vote on the merits. (R. 28-29). Nearly a dozen reapportionment amendments were

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[5] Bell, The Legislative Process In Maryland (Univ. of Md., 1958), p. 15.

introduced at the 1961 and 1962 regular sessions of the Maryland General Assembly. None of these passed.

While the Constitution of Maryland provides that the General Assembly is to provide for "taking the sense of the people" in regard to calling a constitutional convention every twenty years,[6] no Constitutional Convention has been convened since 1867. A Constitutional Convention would have the power to propose amendments to the Maryland Constitution, including amendments to reapportion representation in the General Assembly. Although in November, 1950, the electorate approved the calling of a Constitutional Convention by a vote of 200,439 to 56,998, the General Assembly has consistently declined to convene it (R. 14). Legislation proposing that a convention be summoned was introduced at sessions of the General Assembly held in 1951, 1954, 1955, 1957, 1960, 1961 and 1962. None of these proposals were enacted (R. 14). One convention bill passed the House of Delegates in the closing days of the 1961 legislative session. However, after legislators from the less populous subdivisions had attacked the proposal as a "frightening device" to secure reapportionment, the convention bill was defeated in the State Senate by a vote of 17 to 11, all the Senators but one from the less populous counties voting against it.[7]

6. *Proceedings Below.* Appellants, with one exception all citizens and eligible voters of Maryland residing in the five most populous areas, filed their bill of complaint in the Circuit Court for Anne Arundel County, Maryland on August 12, 1960. Defendants are the election officials of

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[6] Art. XIV, Section 2, of the Maryland Constitution. Representation in a Constitutional Convention, if the legislature finally did convene one, would be on the same basis of representation as now exists in the General Assembly itself.

[7] *Washington Evening Star*, March 30, 1961, p. B-2; *ibid*, April 2, 1961, p. B-2.

the State of Maryland and of Anne Arundel County (R. 2). Plaintiffs sought a declaratory judgment that the existing representation as then provided in the Maryland House of Delegates and State Senate by virtue of Sections 2 and 5 of Article III of the Maryland Constitution violated Section 1 of the Fourteenth Amendment.[8] In addition to seeking declaratory relief, appellants asked for injunctive relief against the conduct of the 1962 elections to the Maryland General Assembly "and thereafter" (R. 20).

Appellees' demurrers were sustained by the trial court on February 21, 1961 on the grounds that issues presented raised political questions beyond the jurisdiction of the court to decide. On appeal to the Court of Appeals for Maryland, this first decision of the Chancellor was reversed, and the case remanded for determination of the federal questions presented. 228 Md. 412, 180 A. 2d 656. Upon remand, and after the appellees had answered the bill of complaint, but had not disputed any of its material allegations, the case was again heard by the trial court on appellants' motion for summary judgment (R. 102). On May 28, 1962, the Chancellor entered an order declaring Section 5 of Article III of the Maryland Constitution, which provided for representation in the House of Delegates, to be in violation of the Fourteenth Amendment and null and void (R. 110). However, he attempted to reserve judgment with respect to the constitutionality of the representation provided in the Maryland State Senate by virtue of Section 2 of Article III of the Maryland Constitution.

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[8] Appellants also contended that the failure to reapportion the Maryland General Assembly violated certain provisions of the Maryland Constitution and the Maryland Declaration of Rights. These issues of State law are no longer in the case. *Maryland Comm. for Fair Rep.* v. *Tawes*, 228 Md. 412, 425, 180 A. 2d 656, 662. Since there were individual plaintiffs, appellees' challenge to the standing of the Committee for Fair Representation, the non-individual plaintiff, was resolved in favor of the latter's standing to sue, 228 Md. 412, 420, f.n. 5, 180 A. 2d 656, 660, f.n. 5.

Appellants took an appeal from the May 28, 1962 decision on the day it was issued (R. 111). The Court of Appeals then directed that the lower Court promptly determine the issue of the constitutionality of Section 2 of Article III. On June 28, 1962, the Circuit Court for Anne Arundel County issued a decree and filed an opinion holding that the present representation in the Maryland State Senate did not violate the Fourteenth Amendment. Appellants immediately appealed to the Court of Appeals for Maryland (R. 123).[9]

The Court of Appeals heard the case in a special session held on July 23, 1962. In the afternoon of that day, the Court issued a *per curiam* order, with three judges dissenting, affirming the judgment of the trial court (R. 124). A timely motion for reargument was denied on September 11, 1962 (R. 125). On September 25, 1962, the Court filed its opinion, three judges dissented, and two dissenting opinions were filed, one written by Chief Judge Brune, the other by Judge Prescott (R. 171, 190).

7. *The Decision of the Court of Appeals for Maryland.* In deciding adversely to the petitioners, the four judge majority opinion of the Court of Appeals for Maryland held: that (1) "the counties of Maryland always have been an integral part of the state government" (R. 165); (2) that while the counties of Maryland are not sovereign, "traditionally [they have] exercised wide governmental powers," and in this respect are "quite analagous to the states, in relation to the United States" (R. 166); (3) that the mode of selecting United States Senators "was modeled, to a considerable extent" upon the method of indirect election of members of the Maryland Senate, as this system existed prior to 1837 (R. 166); and (4) that "historical prece-

[9] Appellants' earlier appeal of the trial court's decision of May 28, 1962 was aborted when the Court of Appeals remanded the case to the Chancellor with directions to determine the Senate question promptly (R. 112).

dents" furnished "a complete justification" for the present manner of selecting members of the Maryland Senate (R. 167).

On these basic grounds, the majority concluded that the so-called "Federal Plan," which obtains in the composition of the Congress of the United States, furnished a sufficient analogy to save the representation afforded in the Maryland Senate by virtue of Article III, Section 2, of the Maryland Constitution, from condemnation under Section 1 of the Fourteenth Amendment (R. 169).

Three judges dissented from the majority opinion, and two dissenting opinions were filed. Chief Judge Brune, in his dissent, noted: (1) that the Maryland House of Delegates is not yet apportioned on a basis which affords a "close relationship" between population and representation (R. 177); (2) that Maryland counties are "creatures of the State" (R. 177); (3) that any alleged pattern of a Federal plan in the composition of the Maryland General Assembly is substantially impaired by the additional representation which Baltimore has been given in the State Senate, that city now having six Senators in its delegation (R. 177); and (4) that there are limitations to the efficacy of attempting to rely on "history" as an alleged rational basis for "geographical representation without regard to present glaring disparities in population between areas." (R. 179).

Finding numerous gross disparities in senatorial representation, the dissenters concluded that the "limit to permissible discrimination is passed" in the composition of the Maryland State Senate (R. 179), and that the State had not met its burden to establish a rational basis with which to avoid the judgment that invidious and unconstitutional discrimination in voting rights exists in this case (R. 183).

Summary of Argument

I

A. Questions of jurisdiction, justiciability, and standing to sue are no longer issues in this case. *Baker* v. *Carr*, 369 U.S. 186, resolved those questions for the nation as a whole, and the Court of Appeals for Maryland has applied that ruling in an earlier decision in these same proceedings. *Maryland Committee for Fair Representation* v. *Tawes*, 228 Md. 414, 428, 180 A. 2d 656, 664.

B. It is an undisputed proposition that a voter's right to cast a ballot without unfair impairment or invidious discrimination in its exercise is protected by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U.S. 368, 375. *Baker* v. *Carr* surely has established that rights of suffrage are also protected from unreasonable dilution resulting from grossly unfair or malapportioned representation in a state legislature, whether the latter be the result of purposeful legislative action or inaction. If *Baker* does not mean at least this, truly it may be regarded as an exercise in futility, having no permanent effect on substantive constitutional law save the negative impact of permitting the continued existence of the national disgrace of gross malapportionment.

On the other hand, if *Baker* v. *Carr* means what it seems to imply, then unconstitutional discrimination in rights of suffrage exist as the result of the present composition of the Maryland State Senate as prescribed by Article III, Section 2, of the Maryland Constitution. Approximately 14% of the population of Maryland can elect a majority of the State Senate. On the other hand, 76% of the State's population receive only 34% of the representation in the State Senate. Numerous gross disparities exist, not only between classes of political subdivisions, but also within classes. For example, one county with a population of a

little over 90,000 has one Senator, while another less populous county with a little over 16,000 also has one Senator. On the other hand, the urban-suburban county of Baltimore, with approximately 500,000 people, has one State Senator, while Baltimore City, with a population slightly in excess of 900,000, is given six State Senators. These are glaring, but only representative, examples of the extent and scope of the gross disparities of representation which now prevail in the Maryland State Senate, not only as between different classes of political subdivisions, but also within the same class or classes thereof.

C. Gross malapportionment has existed in Maryland for a long time, and has grown steadily worse. Apart from the limited and temporary reapportionment of the House of Delegates enacted at a special session of the General Assembly in May, 1962, no substantial reapportionment has taken place since 1837, except that the City of Baltimore was given three legislative districts, including three Senators in 1864, received one more legislative district and one more Senator in 1900, and was allotted two more legislative districts and two more Senators in 1922. In 1937 it took 18.1% of the State's population to elect a majority of the 29 member State Senate; at present 14% of the population are now so favored; by 1970, 12% should be sufficient.

The citizens of the more populous political subdivisions of Maryland have tried, desperately and persistently, to break the stranglehold on state government which the representatives from the less populous areas have so long possessed. From 1951 through 1962, some 23 reapportionment bills were introduced in the General Assembly. None succeeded of passage. Similarly, no legislation approving a Constitutional Convention, which would have the power to submit constitutional amendments for approval by the voters, has been enacted since 1867, although many pro-

posals to convene a convention have been unsuccessfully introduced in the General Assembly.

The people of Maryland do not enjoy the right of initiative. They also are powerless to institute a proposed constitutional amendment, since this can only be done after three-fifths of the members of both Houses of the General Assembly have approved its submission to the electorate.

Maryland's experience confirms that of many other States. Legislative reapportioning *cannot* be expected in the absence of an authoritative judicial decision, but *can* be expected in the wake of such a decision. Unlike some of the difficult experiences which have accompanied lower courts' attempts to implement the school segregation decisions of this Court, there is no reason to expect that an authoritative ruling of the Court, followed by implementing decrees of the Maryland courts, will not be sufficient to induce the General Assembly to reapportion in a constitutional manner. The prior history of these same proceedings support that prediction.

D. Malapportionment represents more than mere mathematical unfairness or abstract injustice; it has important practical consequences as well. These have a far reaching impact on the nature of state government as well as the relationship of the States to the Federal Government, and even on the representation afforded in the House of Representatives of the Congress. Ultimately, therefore, gross malapportionment in the States has a direct effect on the national legislative process.

The scheme of malapportionment challenged in this case is especially familiar to the urban-suburban residents of most of the States of the Union. As one commentator has observed, "malapportionment strikes at one of the mainsprings of our democratic government." Tabor, *The Gerrymandering of State and Federal Legislative Districts*,

16 Md. L.R. 277, 303 (1956). One of the major consequences of what has been called "the rural stranglehold on State legislatures" has been the neglect of the pressing problems of the heavily populated urban and suburban areas. The decay of large cities, the neglected expansions of suburban areas, financial and planning crises in education, housing, transportation, water, sewage, urban redevelopment and civil rights problems, furnish the unpleasant hallmarks of almost every metropolitan area in the United States. Lewis, *Legislative Apportionment in the Federal Courts*, 71 Harv. L.R. 1057, 1058 (1958).

In Maryland, as in many other States, domination of the legislature by the less populated subdivisions has meant substantial discrimination in the form of tax and revenue preferences afforded the residents of those less populous areas at the expense of those living in the more populous subdivisions. Statutory formulae which control the manner and amount of the return of State funds to the local political subdivisions in Maryland invariably prefer the rural minority, whose representatives in the General Assembly resist all efforts to revise the formulae.

Another major adverse practical effect of malapportionment in Maryland is the inability to secure a Constitutional Convention for the purpose of revising Maryland's 100 year old Constitution, now cluttered with unnecessary, detailed and prolix provisions, which should be in the statutes and not proliferating the basic charter of State Government. Despite the overwhelming sentiment expressed in the 1950 election in favor of a Constitutional Convention, the General Assembly has consistently refused to enact the enabling legislation required. The reason is no secret; a Constitutional Convention would have the power to revise the provisions of the Maryland Constitution which perpetuate grossly disproportionate representation, especially in the State Senate. *Baltimore Morning Sun*, December 12, 1950,

p. 16; *Washington Post & Times Herald*, December 13, 1962, p. B-7.

E. Of course, not every discrimination is invidious, and legislative action is entitled to the presumption of constitutionality. *McGowan* v. *Maryland*, 366 U.S. 420, 426. Nevertheless, where fundamental liberties are involved, "there are limits to the extent to which the presumption of constitutionality can be pressed." *Skinner* v. *Oklahoma*, 316 U.S. 535, 544. These limits have been passed in this case, and the State has not met its burden of explaining or establishing a rational basis for the gross discrimination in rights of suffrage which prevail as a result of the representation now afforded in the General Assembly.

Moreover, appellants find hope, as well as support, in this Court's decision in *Gray* v. *Sanders*, 372 U.S. 368. If the "concept of political equality," as protected by the Fourteenth Amendment, applies to the counting of votes cast for executive officials in a state-wide election, it is very difficult to see why it should be any less applicable in the protection it affords to votes cast for legislative representatives. *New York Times* (Western Ed.), March 21, 1963, p. 6. One man cannot enjoy ten times the voting power of another, wherever he may reside. In the Maryland State Senate, discriminatory weighting of representation reaches 32 to 1. This, as the dissenting opinion below stated, "exceeds the permissible limit."

II

A. The trial court and the Court of Appeals for Maryland apparently found historical, if not legal, analogy in Article 1 of the Federal Constitution sufficient to justify the gross disparities now tolerated in the representation provided in the Maryland State Senate. The short answer is that, as a matter of pure and unchallenged historical

fact, at least since 1864, Maryland has not observed a Federal plan or a system of representation fairly analogous to such a plan. It is true that from 1776 to 1837, the House of Delegates was popularly elected, while Senators were indirectly elected by a college of electors. However, Maryland's early experience with a Senate elected on a basis of suffrage completely different from that of the lower House proved not to be very salutary. Within a few years, serious discord between the two Houses brought the State to the brink of armed conflict. Finally, in 1837, after a titanic constitutional and political struggle, the indirect election of Senators was abolished and the State Senate was made a popularly elective body by direct vote of the people, with one Senator from each county and one from the City of Baltimore. Radoff, The Old Line State (Historical Record Assoc.; 1956), pp. 43-64; Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 11.

Beginning in the early 19th Century and extending to 1864, a number of attempts were made to change the basis of representation in the General Assembly. Usually, these efforts were undertaken by the Delegates from Baltimore City (which was growing very rapidly in population), with the assistance of the representatives of the expanding counties of Western Maryland. However, the Federalists and their successors, the Whigs, were able to resist the enactment of these proposals. In doing so, they expressed continued alarm over the burgeoning population of Baltimore and its large percentage of foreign born, and therefore suspected, citizens. Steiner, Citizenship and Suffrage in Maryland, (Baltimore: Cushing & Co., 1895), p. 32.

Finally, however, in the Constitutional Convention of 1864, convened while Maryland was under the yoke of the Union Army, Baltimore City was given additional representation in the form of three legislative districts, including one Senator for each of the three districts. The Constitu-

tional Convention of 1867 confirmed the increased representation which Baltimore had received in the 1864 convention.

In 1900, Baltimore received an additional legislative district and one more Senator. It was given this additional representation solely because of its expanding population. *Baltimore Sun*, February 14, 1900, p. 8. By 1920, when its population had reached 51% of the State's total, Baltimore was awarded two more legislative districts, including two more State Senators, making a total of six Senators, the representation which the City enjoys in the General Assembly at present. Again, the additional representation given Baltimore was solely because of the growth of the City's population. Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 15.

Since 1864, therefore, at least so far as the City of Baltimore is concerned, population has been taken into some account in the representation permitted in the Maryland State Senate. Having been applied, the population factor must be invoked on a rational basis. Their expanding populations require that the other urban and suburban areas of Maryland be entitled to the same treatment which Baltimore has been given in the past. Anything less than such treatment is clearly to pursue or to permit the invidious discrimination within a class which the Fourteenth Amendment condemns.

In another important and distinctive respect, it is also established that no Federal plan has been adopted and adhered to by Maryland. Unlike the House of Representatives, the Maryland House of Delegates has *never* been based on population. At the present time, even allowing for the temporary "stop-gap" reapportionment of the House of Delegates, the four large suburban counties in Maryland, where 45% of the State's population live, are given only 28% of the representation in the House of Delegates. If a

true Federal plan had been followed in Maryland, the suburban counties and the City of Baltimore would be entitled to 105 Delegates out of the 142 member House; they have, however, only 79. 76% of the State's population still lack the voting strength (3/5ths of 142, or 86 members) to approve a constitutional amendment in even the House of Delegates. Population, to this day, never has been either the exclusive or the approximate basis of representation in the House of Delegates. In this second fundamental respect, the attempted Federal analogy also fails as a matter of history.

B. Even as a hypothetical analogy, however, a Federal plan for Maryland would not suffice to protect the present gross disparities of representation in the Maryland State Senate from condemnation as invidious discrimination. The so-called "Federal analogy" is more a desperate afterthought than a compelling argument. The early commentators on the structure of state government in America, who wrote during a period when many state constitutions were being drafted and revised, did not find analogy between the two-house state legislature and the Congress; see, *e.g.*, Bryce, I, *The American Commonwealth*, 484 (1917 ed.). The chief, if not the exclusive, justification for bicameralism in state government is that it insures against precipitate action. *Mann* v. *Davis*, 213 F. Supp. 577, 585 (E.D. Va., 1962), prob. juris. noted, 374 U.S. 803. The historical basis of Article I of the Federal Constitution, on the other hand, is well known to all students of American history. The Federal plan represented by Article I was the fruit of the reluctant compromise which the larger states in the Constitutional Convention were forced to accept in order to form the Union. Morgan, Birth of the Republic (Univ. of Chicago, 1956), p. 141; Farrand, The Framing of the Constitution of the United States, 105

(1913); Madison, *The Federalist Papers*, No. 62, American State Papers, 43 Great Books Ed., 189.

These historical reasons do not carry over to provide a rational basis for the grossly disproportionate representation which now exists in the Maryland State Senate. Maryland is not a federated republic; it is a unitary State. Its counties, and even more so, its legislative districts, are neither sovereign or quasi-sovereign bodies. 6 Md. Law Encycl. 497. As in other States, the counties of Maryland are completely dependent on the state legislature for both their existence and their continued exercise of governmental powers. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178.

The Federal analogy, even if it had been applicable as a matter of historical fact to Maryland, would be insufficient in another material respect. Article I of the Federal Constitution, having been expressly written into that Constitution, cannot be attacked as unconstitutional, so far as the Federal Government is concerned. The Fourteenth Amendment, enacted 78 years later, and binding the States, not the Federal Government, permits, indeed sustains, a challenge to a Federal plan of representation so far as the States are concerned, where the application of such a plan or system of representation in a state legislature would sanction, as it would in Maryland, "invidious discrimination." *Scholle* v. *Hare*, 360 Mich. 1, 123, 104 N.W. 2d 63, reversed and remanded 369 U.S. 429.

Various federal and state courts have reached conflicting results regarding the alleged applicability of the Federal analogy in considering claims of disproportionate representation in state legislatures. This Court has not yet passed upon that precise issue. However, appellants hopefully read its decision in *Gray* v. *Sanders*, 372 U.S. 369, 378, as an indication that it will hold that the so-called analogy is "inapposite" in determining whether the representation

provided in a state legislature complies with the requirements of the Fourteenth Amendment.

III

From the beginning, the appellants have challenged the *total* representation afforded in the General Assembly of Maryland, as well as that provided in the State Senate considered as a separate house. The fundamental issue is the value of rights of suffrage possessed by the citizens of Maryland. Ultimately, this refers to the ability to pass legislation preferred by a majority. In a bicameral legislature, the enactment of legislation requires not a majority of all the legislators in both Houses, but a successive majority of the legislators in each House. *Sincock* v. *Duffy*, 215 F. Supp. 169, 171 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock et al*, No. 307.

A state legislature in which population is taken into account in one house and rejected in the other, guarantees government by paralysis and the frustration of the majority will. Maryland experienced that type of government at cross purposes once before, from 1776 to 1837. Now, 125 years later, Maryland has provided a political scientist's case study of the consequences of the stalemated government which can exist when the bases of legislative representation in the same body are so irreconcilably divergent. Of ten items of significant legislation considered at the 1963 session of the Maryland General Assembly, disagreement between the Senate, dominated by the less populous areas, and the House of Delegates, more responsive to the majority will, resulted in legislative deadlock with respect to seven of them. On the one hand, the House of Delegates passed by a comfortable margin legislation to outlaw the unit rule in primary elections; to reapportion the legislative districts of

the City of Baltimore on an equitable basis; to increase financial aid to the State's public school system; to increase credit availability for small loan purposes; and to develop Assateague Island as a public park. The Senate ignored or rejected all these House approved proposals. However, on the other hand, it found the opportunity to pass a bill to reapportion only the House of Delegates on a basis which within a few years would produce even more severe malapportionment than now prevails in that body, and to approve a radical proposal to amend the Federal Constitution in a manner that would permit the Congress to be by-passed in the amending process in the future. The 1963 session of the General Assembly demonstrates the absurdity of a state legislature in which the primary basis of representation in one house is population, but where the exclusive basis of representation in the other is area.

Appellants believe in bicameralism. However, for a bicameral legislature to operate as an effective instrument of state government, it cannot rest, as the Maryland General Assembly now does, on a structure of sharply divided and completely divergent representation, wherein one house represents people and the other represents only "geography," areas, units of local government, "history," or the once more equally populated political subdivisions of days long past. Locke, *Concerning Civil Government*, 35 Great Books Ed., 61. The basic purpose in having a two house state legislature is to insure that it is *more*, not *less* representative of the body politic. Accordingly, minority rule, even if allowed in just one house thereof, stultifies the legislative process, robs the principle of majority rule of any working vitality, and flouts both equal protection and due process of law.

IV

A. The overriding standard which should apply in all reapportionment cases is the principle of absolute equality of suffrage, or the same concept of "one man, one vote" which this Court adhered to in *Gray* v. *Sanders, supra*. Appellants perceive no substantial differences serving to distinguish a state electoral from a state representative process. However, if there are differences between voting in a state-wide primary and voting for representatives to a state legislature which are thought significant enough to justify some departure from the strict principle of electoral equality in the latter situation, such departures or deviations must be absolutely minimal. Under *all* circumstances, however, representation in at least one House of a state legislature must be based *exclusively* on population. *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962). The only extraneous factor which might be taken into account in permitting, in isolated cases and under compelling circumstances established by the state, some slight deviation from the strict population standard in *one* house *only*, possibly might be the long continued existence of instrumentalities of American local self-government, such as counties or towns. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 700, 1963. However, in permitting, in these rare cases, some minimal recognition for units of local self-government in *one* house of a state legislature, in no event should the disparities which would result therefrom be allowed to exceed a ratio of 1½ to 1, *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), and such minimal disparities should not be permitted as between political subdivisions of the same class, *Baker* v. *Carr*, 369 U.S. 186, 254.

Unless *Baker* v. *Carr* was intended to do no more than to establish procedural or jurisdictional points, however mini-

mal the standards which this Court ultimately chooses to lay down in reapportionment cases, the gross disparities of representation for so long tolerated in the Maryland General Assembly, and especially in the State Senate, violate the Fourteenth Amendment.

B. The history of these proceedings is proof that, should this court hold that the representation now provided in the General Assembly is unconstitutional, the Maryland General Assembly will act to correct it. The experience of over fifteen other States has been the same. Even though the judicial *minimum* will be the legislative *maximum*, there is the encouraging fact that many decisions of both State and Federal courts, whether voiding existing apportionment legislation or asserting jurisdiction to do so, have been followed, however reluctantly, by the passage of at least some legislative reapportionment. McKay, *supra*, pp. 706-710; *Washington Post & Times Herald*, March 24, 1963, p. C-1. The aftermath of a favorable decision in this case will be no different.

ARGUMENT

I

Invidious Discrimination Prevails in the Maryland State Senate

A. *Jurisdiction Is Settled.* Questions of jurisdiction, justiciability and standing to sue are no longer issues in this case. *Baker* v. *Carr*, 369 U.S. 186, resolved those questions for the nation as a whole, and the Court of Appeals for Maryland applied that ruling in an earlier decision in these same proceedings, 228 Md. 414, 428, 180 A. 2d 656, 664. Although *Baker* did not deal directly with the issue of justiciability in state judicial proceedings, apparently it has been accepted by the state courts as con-

trolling in those tribunals, as well as in federal courts. Malapportionment suits have reached the highest appellate courts of at least ten States since *Baker* v. *Carr* was decided. So far as appellants have been able to discover, no State court has dismissed such a suit for lack of justiciability. See, e.g., *Sweeney* v. *Notte*, (R.I.), 183 A. 2d 296.[10] There would no longer seem to be room for argument, therefore, that the Fourteenth Amendment does not protect against geographical discriminations proved to be invidious and resulting in grossly unreasonable dilution of the voting rights of citizens residing in the more populous areas of a State, whether that claim is asserted in a Federal or in a State court

B. *Gross Disparities of Representation Exist in the Senate.* It is an undisputed proposition that a voter's right to cast a ballot without unfair impairment or invidious discrimination in the exercise of suffrage is protected by the Fourteenth Amendment. *Gray* v. *Sanders*, 372 U.S. 368, 375; *Smith* v. *Allwright*, 321 U.S. 649; *Terry* v. *Adams*, 345 U.S. 461. Justice Brennan referred to this controlling principle in the majority opinion in *Baker* v. *Carr*, *supra*: A reading of his language, and an examination of Justice Clark's concurring opinion, as well as that of Justice Douglas, establishes that this Court will apply traditional Fourteenth Amendment concepts of reasonable classifications or distinctions in determining whether invidious discrimination, geographic, populative, or otherwise, exists in suffrage cases. As Justice Brennan said in *Baker*:

> "Their [plaintiffs'] constitutional claim is, in substance, that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitu-

[10] *The Discretionary Power of the Supreme Court to Dismiss Appeals from State Courts* (Note), 63 Columbia L.R. 688 (1963).

tion or any standard effecting a gross disproportion of representation to voting population. The injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties. *A citizen's right to vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution,* when such impairment resulted from dilution for a false tally, *cf. United States* v. *Classic*, 313 U.S. 299; or by a refusal to count votes from arbitrarily selected precincts, *cf. United States* v. *Mosely*, 238 U.S. 383, or by a stuffing of the ballot box, *cf. Ex parte Siebold*, 100 U.S. 371; *U. S.* v. *Saylor*, 322 U.S. 385." (Emphasis added).[11]

Appellants believe that *Baker* v. *Carr* certainly did more than put to rest issues of jurisdiction and justiciability. We read that historic decision to establish that gross dilution of voting rights which results from unreasonable geographical discrimination, whether the result of purposeful legislative action or inaction, can exceed constitutional limits. If *Baker* does not mean at least this, truly it may be regarded as an exercise in futility, representing only judicial jousting over jurisdiction and justiciability, but intended to have and, indeed, having, no permanent effect on substantive constitutional law, save the negative impact of permitting the continued existence of the nationwide disgrace of gross malapportionment, at the curtailment or elimination of which many observers had believed this Court's historic ruling in *Baker* to have been directed.[12]

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[11] 369 U.S. 186, 208.

[12] *Baker* v. *Carr*, one commentator has said, "may . . . be taken as a watershed in American political history. Its symbolic significance is certainly as great as will be its practical effect." Kristol, *Social Science and Law*, Great Ideas Today (Ency. Brit., 1962), p. 222.

But if appellants are right and if, in Justice Clark's words, "incommensurables of both magnitude and frequency" in representation allowed in a state legislature give rise to "invidious discrimination," then such unconstitutional discrimination exists in the present composition of the Maryland State Senate provided for by Article III, Section 2, of the Maryland Constitution. Approximately 14% of the population of Maryland now hold a majority of the seats in that body. On the other hand, citizens of Maryland living in the more populous political subdivisions, where 76% of the State's population may be found, have only 34% of the representation in the State Senate. One Senator from Baltimore County represents an area whose population is greater than that which it takes to elect a majority of the entire State Senate.

Even within general classes of political subdivisions, gross discrepancies exist in the representation permitted. For example, Washington County, with a 1960 population of a little over 90,000, has one Senator; Queen Anne's County, with a 1960 population of a little over 16,000, also has one. On the other hand, the urban-suburban County of Baltimore, with approximately 500,000 people, has one State Senator, while the City of Baltimore, with a population of a little in excess of 900,000, is given six State Senators. The four large suburban counties of Anne Arundel, Baltimore, Montgomery and Prince Georges, with a population nearing 1,500,000, or 45% of the State's total population, have a total of four State Senators, yet the City of Baltimore enjoys six State Senators.

The existing disparities "are of sufficient magnitude" to rebut even the strongest presumption of constitutionality and to establish the unconstitutional dilution of voting rights which the Fourteenth Amendment forbids. *Lisco* v. *McNichols*, 208 F. Supp. 471, 478 (D. Colo., 1962).

C. Only Judicial Relief Can End or Mitigate the Discrimination. The injustice and the unconstitutional dilution of rights of suffrage, for relief of which appellants now have come to this Court, have long existed in Maryland. Over thirty-five years ago, the acidulous Baltimorean, H. L. Mencken, was provoked to complain that:

> "The yokels hang on because old apportionments give them unfair advantages. The vote of a malarious peasant on the lower Eastern shore counts as much as the votes of twelve Baltimoreans. But that can't last. It is not only unjust and undemocratic; it is absurd." [13]

While appellants lament Mencken's lack of charity, they also regret his conspicuous failure as a prophet in this instance. Unfortunately, with the exception of a mild reapportioning of the House of Delegates achieved at the May 1962 special session of the General Assembly, the unjustified political preference bestowed on a small minority of the voters of the Free State through a malapportioned legislature, and especially the Senate thereof, not only has endured but has increased since Mencken's bitter outburst of 35 years ago. True, the principal victims of what has been labeled "Barnyard Government" in Maryland may no longer be the voters of the City of Baltimore, but are now the partially disfranchised inhabitants of the large and heavily populated suburban counties. Still, no one can dispute that minority rule in the General Assembly of Maryland has not been shaken, much less toppled. In the Maryland Senate, the vote of one resident of the lower Eastern Shore now counts as much as the votes of thirty-two residents of Baltimore County! What Mencken thought could not last because of its absurdity continues to exist, to grow more absurd, and to an even greater extent, to deny the

[13] *Baltimore Evening Sun*, July 23, 1928, p. 15.

constitutional rights of those against whom the system discriminates.[14] In 1937, 18.1% of Maryland's population could elect a majority (15) of Maryland's 29 member State Senate. In 1963, 14% of the population are now so favored.[15]

It is not that citizens of the more populous political subdivisions of Maryland have not tried, desperately and persistently, to break the stranglehold on the State Government so long possessed by the representatives from the less populous areas. From 1951 through 1960, 11 proposals were introduced in the Maryland General Assembly, seeking merely the reapportionment of the House of Delegates. None of these were enacted; nor did any ever reach a vote on the merits (R. 28). This suit was filed in August, 1960. Subsequently, nearly a dozen reapportionment bills were introduced in the 1961 and 1962 regular sessions of the Maryland General Assembly, but none of these succeeded of passage.

Similarly, no legislation approving a Constitutional Convention which would have the power to propose apportionment amendments, has been enacted since 1867, although convention legislation was introduced in the 1951, 1954, 1955, 1957, 1960 and 1962 sessions of the General Assembly (R. 14). Moreover, representation in a Constitutional Convention would be on the same malapportioned basis as exists in the General Assembly.

The people of Maryland do not enjoy the right of initiative. They are also powerless to institute a proposed constitutional amendment. Under the Constitution of Maryland, a constitutional amendment can only be proposed by a

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[14] Lucas, *Barnyard Government in Maryland*, Reporter Magazine, April 12, 1962, p. 31.

[15] Dauer and Kelsey, *Unrepresentative States*, 44 *Nat. Munic. Rev.* 571, 575 (1955). If our population projections are accurate, by 1970 only 12% of the population will be required to elect a Senate majority. *Maryland Population Forecasts, 1965 and 1970, supra*, f.n. 1.

three-fifths vote of both the House of Delegates and the State Senate.

The futile efforts of the more populous areas to secure some reapportionment of representation in Maryland duplicate the experience of many other States. They confirm the perceptive observation, made a long time ago by a State court, that it "would be idle and futile to . . . [seek relief from malapportionment through] . . . the voluntary action of the body that made it." *State* v. *Cunningham*, 81 Wisc. 440, 483, 51 N.W. 724. The representatives from the less populous areas have too great an advantage to relinquish voluntarily their unnatural position of political preference in the absence of any binding court determination holding that it is unconstitutional for them not to do so.[16]

The long history of futile attempts to reapportion the Maryland General Assembly prior to the decision of this Court in *Baker* v. *Carr*, *supra*, quickly followed by the first decision in this case by the Court of Appeals for Maryland, 228 Md. 412, 180 A.2d 656, and the trial court's determination of May 28, 1962 voiding representation in the House of Delegates, is additional and, we believe, convincing evidence that, the nature of man, the politician, being what it is, legislative reapportioning *cannot* reasonably be expected in the absence of a controlling and authoritative judicial decision making it clear that existing representation violates constitutional rights but *can* be expected in the wake of such a decision.

In contrast to the issue resolved in the school segregation decisions announced by this Court in 1954 in *Brown* v. *Board of Education*, 347 U.S. 483, legislative malapportionment is not a subject that has deep and almost unbreakable roots in the culture of a large segment of the American

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[16] Short, *States That Have Not Met Their Constitutional Requirements*, 17 Law & Contemp. Probs. 377, 381 (1952); Schumacher, *Reapportionment in Oregon*, 3 W. Pol. Q., 428 (1950).

society. Primarily, if not exclusively, it is only the rural legislators, not their less self-interested constitutents, who can be expected to protest until the ultimate outcome. Unlike some of the difficult experiences which have accompanied lower court attempts to implement the school segregation decisions of this Court, there is absolutely no reason to expect, certainly not in Maryland, that an authoritative ruling of this Court, followed by implementing decrees of the Maryland Courts, will not be sufficient to induce the General Assembly of Maryland to perform its long neglected constitutional duty and to eliminate the invidious discrimination in rights of suffrage which is the direct consequence of the gross malapportionment which prevails in the Maryland State Senate in particular, as well as in the General Assembly as a whole.

D. *Adverse Consequences of Malapportionment.* Malapportionment represents more than mere mathematical unfairness or abstract injustice; it has important practical consequences as well. These have a far reaching impact on the nature of government in the States of the Union and with respect to the relationship of those States to the Federal Government and, indeed, even on the representation afforded in the House of Representatives of the Congress and thus, ultimately, on the national legislative process. In our opinion, the evil impact of gross malapportionment, as it has existed for so long and in so many States, represents a cancer on the body of democratic government, perhaps only equalled by the curse of segregation sanctioned by state law.

The denial or dilution of the right of suffrage because of race, creed or color, concededly is both undemocratic and reprehensible. Yet, until recent years it was, at least in one large area of the United States, both widespread and effective in achieving its purpose. However, in comparison to the extent and the effectiveness of the disfranchisement

of otherwise eligible voters which is achieved through the malapportioning of representation in State legislatures, the impairments of suffrage which were condemned in the voting right cases referred to earlier in this brief appear almost minor.

The scheme of malapportionment of legislative representation which appellants challenge exists in most of the States of the Union. The situation is especially familiar to the urban and suburban voters throughout the country who are caught in its seemingly unbreakable grip. Baker, State Constitutions: Reapportionment (1960), p. 1. The existence of this widespread and well known evil has been a subject of critical comment by many informed public officials who have encountered the problems it poses.[17] Continued and careful study on the part of the political scientists also has produced almost universal condemnation of the malapportionment of representation which exists in so many State governments and the adverse consequences of that blight on the principle of representative government. See, *e.g.*, Baker, Rural v. Urban Political Power (1955); Walter, *Reapportionment and Urban Representation*, 195 Annals 11, 12 (1938); De Grazia, *General Theory of Apportionment*, 17 Law & Contemp. Prob. 356 (1952). Equally vigorous in their criticism of malapportionment and the failure of state legislatures to do anything to remedy the situation, have been the legal commentators.[18] Representatives of the press, with increasing perceptiveness and inten-

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[17] Commission on Intergovernmental Relations, A Report to the President, 38-40 (1955); Douglas, *Unequal Voting: A Challenge to Democracy*, 1 Labor's Economic Review, 89, 99 (1958); *Collins, Cold War Casualties*, 47 Natl. Munic. Rev. 11, 13 (1958); Baker, Rural Versus Urban Political Power, 27-28 (1955).

[18] See, especially, the comprehensive and evocative law reveiew article by Lewis, *Legislative Apportionment and the Federal Courts*, 71 Harv. L.R. 1057 (1958); Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277 (1956); and for an exhaustive symposium on the whole subject, consult 17 Law & Contemp. Prob. 253-469 (1952).

sity, have been directing their journalistic fire at malapportionment and at the denial of representative government for which it stands.[19]

Several years ago, before his election as President, the then Senator Kennedy, in an article entitled "*The Shame of the States*," New York Times Magazine, May 18, 1958, p. 12, noted that:

> "[T]he apportionment of representation in our legislatures and to a lesser extent in Congress, has been either deliberately rigged or shamefully ignored so as to deny the cities and the voters that full and proportionate voice in government to which they are entitled."

This widespread alarm and dissatisfaction is justified. As one commentator observes, malapportionment "strikes at one of the mainsprings of our democratic government." Tabor, *The Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277, 303 (1956). Nor can there be much doubt that the "continual disregard of the basic values professed by a society usually engenders among the public a sense of frustration, cynicism or apathy." Baker, *One Vote, One Value*, 47 Natl. Munic. Rev. 16 (1948). On principle, unreasonable discrimination in the representation allowed the political subdivisions of a state cannot be defended, unless one agrees with the poet, Homer, a defender of the aristocracy of ancient Greece, that it "is not good that the few should be governed by the many."[20]

Aside from the repudiation of the basic tenet of repre-

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[19] Strout, *The New Election Is Already Rigged*, Harpers Magazine, November 1959; *The Wall Street Journal*, October 17, 1960, p. 1.

[20] Davidoff, Treasury of Proverbs (Grossett & Dunlap: N. Y. 1946), p. 92. The decline of the Roman republic, perhaps, may be traced to the rejection in 124 B.C. by the Roman assembly of an electoral reform proposed by Caius Gracchus which would have bestowed full suffrage rights on all Latins, rather than restricting such rights to the 35 wards or "rotten boroughs", representing the original Latin tribes. Frank, A History of Rome (Holt: N.Y., 1923), p. 207.

sentative government which malapportionment represents, toleration of it inevitably produces adverse practical effects upon the operation of the governments of the States of the Union. It seems indisputable that malapportionment in legislative representation generally is grounded in a deeply rooted rural bias. Lewis, *Legislative Apportionment in the Federal Courts*, 71 Harv. L. R. 1057, 1064 (1958); Baker, State Constitutions, Reapportionment 4 (1960); Hurst, The Growth of American Law: The Law Makers 42 (1950). Moreover, it is almost impossible, in the nature of men, especially of politicians, to convince the legislative representatives from the rural areas to voluntarily surrender any portion of the preferential political power they may enjoy. Short, *States That Have Not Met Their Constitutional Requirements*, 17 Law & Contemp. Probs., 377, 381 (1952). As the last cited commentator has observed:

> "The advantage of political power now possessed by rural constituencies is not to be given up without a struggle. Such an advantage is particularly useful in the matter of determining tax rates and new sources of tax revenue, the formulae and amounts of State grants-in-aid, and the allocation of shared taxes. Individual legislators are apprehensive over the personal consequences of redistricting, including changes in district boundaries in large areas for campaigning, the possibility of having to run against each other, and the shifting of party strength."[21]

One of the major consequences of what has been called the "rural stranglehold" on State legislatures,[22] has been the neglect of the pressing problems of the heavily populated urban and suburban areas. The decay of large cities,

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[21] See also, Schumacher, *Reapportionment in Oregon*, 3 Western Pol. Q., 428 (1950).

[22] Lerner, America as a Civilization (Simon & Schuster: N.Y., 1957), p. 393.

the neglected expansions of suburban areas, financial and planning crises in education, housing, transportation, water, sewage, urban redevelopment, and civil rights problems, furnish the unpleasant hallmarks of almost every metropolitan area in the United States. Lewis, *supra*, p. 1058.

A former Mayor of Baltimore has experienced and complained of the adverse effects on his city caused by the indifference of a General Assembly dominated by representatives from the less populous areas. In pointing to the difficulty which the City of Baltimore has encountered in getting a satisfactory metropolitan transit authority approved by the General Assembly, former Mayor Grady stated:

> "Because the counties can marshal more voting strength in the legislature . . . their delegations can force more compromises of their special needs than can the city's representatives . . . if these problems are attacked one at a time . . . the city is liable to come out on the short end of all of them." [23]

As the rurally dominated legislatures continue to oppose, or more usually to ignore, the numerous economic and social problems with which their city and suburban colleagues wrestle, the inevitable consequence is that the responsible officials of the neglected metropolitan areas turn to the Federal government to invoke its aid in the solution of the difficulties with which they are beset. Harvey, *Reappor-*

[23] *Baltimore Morning Sun*, March 2, 1961, p. 30. To appellants' knowledge, Delaware is the only State, aside from Maryland, where the State constitution permanently freezes the representation afforded in *both* branches of the State legislature. Baker, *State Constitutions: Reapportionment*, 47 Nat'l Munic. Rev., pp. 63-70; see also, Baker, Rural Versus Urban Political Power, Table 1, p. 16 (1955). However, if the recent decision of a Delaware three judge court is upheld in this Court, the Delaware freeze will be ended. *Sincock* v. *Duffy*, 217 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub. nom. Roman* v. *Sincock, etc.*, No. 307.

tionment of State Legislatures—Legal Requirements, 17 Law & Contemp. Probs., 364, 376 (1952); see also, Commission on Inter-Governmental Relations, A Report to the President (1955), p. 3. As former Governor Collins of Florida has said, "thwarted in their attempt to obtain the understanding and cooperation of rurally dominated state legislatures to help them in solving their problems, it is only natural that our citizens have turned to Congress for relief." Collins, *Cold War Casualties*, 47 Natl. Munic. Rev., 11, 13 (1958).

In Maryland, as in many other States, rural domination of the legislature has meant substantial discriminations in the form of tax and revenue preferences afforded the residents of the less populous areas, at the expense of those living in the more populous political subdivisions (R. 9). Much of the revenue collected by the State of Maryland from residents of the various political subdivisions is returned to the local areas pursuant to certain statutory provisions. These statutory provisions incorporate "equalization" formulae which control the manner and amount of the return of State funds to the local political subdivisions. These formulae, it need hardly be stated, were put into the statutes by the rural minority which so long has dominated the Maryland General Assembly, and which still controls its Senate. Their representatives resist to their effective utmost practically all changes in the equalization formulae which would have the effect of increasing the share afforded the more populous areas and reducing that given to the less populous political subdivisions (R. 9).

There is another major adverse practical effect of malapportionment in Maryland. Maryland's Constitution is almost 100 years old. Since 1867, 137 amendments to the Constitution have been proposed, of which 111 have been ratified by the people of Maryland. As a consequence, Mary-

land's ancient Constitution is cluttered with unnecessary, detailed and often prolix provisions better found in the statutes rather than in the fundamental charter of State Government. *Bethesda-Chevy Chase Tribune*, December 21, 1962, p. 4. Unarguably, the Maryland Constitution stands in need of extensive revision in order that it may be made more responsive to the needs of an important State in the middle 20th Century.[24] Indeed, the framers of the present Maryland constitution recognized the possibility that periodic general review of the Constitution would be desirable and necessary. The specific provisions of Article XIV, Section 2, and Article XVIII, Section 9, of the Constitution provide for the submission to the voters of the question of a constitutional convention every 20 years. Notwithstanding an overwhelming sentiment expressed in the 1950 election in favor of a constitutional convention[25], the General Assembly has consistently refused to enact the enabling legislation required. The reason has been no secret; a Constitutional Convention would have the power to alter the present provisions of the Maryland Constitution which perpetuate disproportionate representation, especially in the State Senate, and to submit new provisions for approval to the vote of the majority of the voters of the Free State. Tabor, *the Gerrymandering of State and Federal Legislative Districts*, 16 Md. L.R. 277, 283, *fn.* 29 (1956); *Baltimore Morning Sun*, Decem-

[24] *Washington Post & Times Herald*, December 13, 1962, p. B-7. For example, this Court has had its attention directed to an archaic constitutional provision under which Maryland juries are judges of the *law* as well as of the facts in criminal cases. *Giles* v. *Maryland*, 372 U.S. 767, appeal dismissed for want of a substantial federal question. See also *Bethesda-Chevy Chase Tribune*, March 8, 1963, p. 4, for editorial comment on the need for a Constitutional Convention to overhaul Maryland's ancient Constitution. The editorial is reprinted in the *Cong. Rec.*, March 21, 1963, p. A1581.

[25] The vote in favor of the proposal to hold a Constitutional Convention was 260,439 for and 56,998 against (R. 44).

ber 12, 1950, p. 16. As a result, the fear by the rural legislators, candidly confessed, that their present position of unnatural political preference and control might be jeopardized, has prevented badly needed and long overdue revision of a great number of other provisions of the State Constitution, to the detriment of all the citizens of Maryland.[26]

E. *A Helpful Precedent for Favorable Action In This Case.* Appellants accept the proposition that not every discrimination is invidious; nor "will it be set aside if any state of facts reasonably may be conceived to justify it." *McGowan* v. *Maryland*, 366 U.S. 420, 426, and cases cited. Moreover, this Court is justified in accepting "as established such reasons for the districting as are fairly conceivable or inferrable in and from the results." *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va., 1962), prob. jurisdiction noted 374 U.S. 803, and pending This Term *sub nom. Davis* v. *Mann*, No. 69. Nevertheless, where fundamental liberties are involved, there "are limits to the extent to which the presumption of constitutionality can be pressed." *Skinner* v. *Oklahoma*, 316 U.S. 535, 544; *United States* v. *Carolene Products Co.*, 304 U.S. 42, 152, *f.n.* 4. These limits have been passed in this case. The State, which did not contest any of the material allegations of the complaint, and could not really do so, has failed in meeting the burden put upon it of explaining, or at least conjuring up, a rational basis for the gross discrepancies of representa-

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[26] Even a modest proposal to establish a Constitutional Commission to study the need for a Constitutional Convention got nowhere at the last session of the Maryland General Assembly. *Washington Evening Star*, January 11, 1963, p. B-2. Maryland's inability to secure a Constitutional Convention brings to mind New Jersey's experience. That State finally obtained a Constitutional Convention only by accepting the demand of its Senate that the convention be precluded from changing the existing system of representation in the legislature. Graves, State Constitutional Revision (Pub. Ad. Serv., 1960), p. 72.

tion which now exist in the Maryland State Senate and, to a lesser degree, in the House of Delegates. It is only "history" to which they can point in their attempt to meet their burden, and for reasons which we discuss in a subsequent section of this brief, their limited effort in this direction also is unavailing.

Appellants say these things with somewhat greater confidence in the efficacy, now that this Court has spoken in a different but closely related context in its landmark decision of *Gray* v. *Sanders*, 372 U. S. 368. There, the Court struck down the ancient, archaic and undemocratic unit rule system of voting in primary elections in the State of Georgia. True, *Gray* v. *Sanders* involved the elections of state-wide officers and not of members of the Georgia legislature. Nevertheless, the principle enunciated there seems to us equally applicable here. If the "concept of political equality" is protected by the Fourteenth Amendment in counting the votes cast for executive officials, it is difficult to see why it is any less applicable in the protection it affords to votes cast for legislative representatives. As the majority opinion rhetorically inquired in *Sanders:*

> "How, then, can one person be given twice or ten times the voting power of another person in a State-wide election merely because he lives in the smallest rural county?"[27]

The answer that the Court gave in *Gray* v. *Sanders* was that the rural voter cannot be so favored. A close observer and reporter of the opinions of this Court has paraphrased the inquiry as follows:

> "Why should it be permissible to use the device of unequal legislative districts, any more than the unit

[27] 372 U.S. 368, 379.

rule system, to give one man ten times the vote of another?"[28]

We believe the answer is again the same; one man cannot constitutionally enjoy a vote worth ten times more than that of a fellow citizen similarly situated. In the Maryland State Senate, discriminatory weighting of representation reaches 32 to 1. As Chief Judge Brune said in his comprehensive dissent in the Court below:

> "A disparity of 32 to 1, we think, does exceed the permissible limit." (R. 179).

This gross disparity and many others almost as bad which now exist in the representation afforded in the Maryland State Senate, "seem much more than are required to assure a proper diffusion of political restraint, to paraphrase the diffusion of political initiative spoken of in *MacDougall* v. *Green*, 335 U.S. 281, at 284." (R. 183).

Is there anything in Maryland's history with which to rebut Chief Judge Brune's conclusion and turn aside the thrust of this appeal? We think not, and so show in the next portion of our brief.

II

A Federal Plan for Maryland: Non-Existent and Non-Analogous

Our adversaries, as well as the majority of the Court of Appeals for Maryland, rest their major defense of the gross disparities of representation which now exist in the State Senate on what they contend is a Federal plan of representation in the Maryland General Assembly analogous to that authorized under the Federal Constitution. We show below that Maryland has had no Federal plan, at least since 1864, and that even if such a plan had been adopted and adhered

[28] *New York Times* (Western Ed.), March 21, 1963, p. 6.

to as the structure of the State legislature, it would not preserve from condemnation under the Fourteenth Amendment the current unreasonable apportionment of representation prevailing in the Senate.

A. *Maryland Has No Federal Plan.* Since at least 1864, population has been taken into some account in the composition of the Maryland State Senate. In establishing this important historical fact, it might be helpful to trace briefly the constitutional history of the evolution of the General Assembly of Maryland. Throughout the colonial period, the upper house of the Maryland legislature consisted of the Governor and Council. The Council was appointed by the proprietor and was modeled after the English House of Lords. It sat as a provincial court and as a court of appeals from the county courts.[29] In the colonial period, the Maryland House of Delegates was selected on a county basis, with four members from each of the counties, of which there were then eighteen. The members of the Council were selected from among the most eminent landowners and office holders and served at the will of the Governor.[30]

The first Constitution of Maryland was adopted in 1776. Article XV thereof provided for a Senate to be selected by electors. Two electors were chosen for each county and one each from Annapolis and Baltimore Town, which was then a part of Baltimore county. Each county was entitled to four members in the House of Delegates. However, Annapolis, then a part of Anne Arundel County, was entitled to two delegates, and Baltimore Town was also given two.

At this time (1776), there were eight counties on the Eastern Shore and ten counties on the Western Shore of Maryland. The electors elected six senators from residents of

[29] Bond, Court of Appeals of Maryland (Amer. Hist. Ass'n: Norwood, Mass., 1933), p. 4; 1 MacMahon, Historical View of the Government of Maryland (1831), p. 148.

[30] Archives of Maryland (Md. Hist. Society: Baltimore, 1947), LXIV, p. xiii.

the Eastern Shore, and nine senators from residents of the Western Shore. The electors were directed to elect "men of the most eminent wisdom, experience and virtue, above 25 years of age, residents of the state above three whole years next preceding the election, and having therein real and personal property above the value of 1,000 pounds current money."[31] At the time the Western Shore contained the three most populous cities of the State, i.e., Baltimore Town, Annapolis and Frederick.

From this it would appear that even under the first Constitution of 1776, population was a factor not completely disregarded in the composition of the State Senate, despite the indirect election of its members and the requirement of substantial property qualifications as a prerequisite to election.

Nevertheless, it was true, as a leading historian of Maryland has documented, that under the 1776 Constitution the State Senate was "deliberately designed to constitute an aristocratic stronghold to check any hasty or ill advised action on the part of the House." Radoff, The Old Line State (Historical Record Assoc., 1956), p. 43. For example, the members elected to the electoral college were required to possess property above the value of 500 pounds. They were elected every five years. As Professor Radoff reports:

> "With these precautions taken, it is not surprising that the government of Maryland remained conservative throughout and after the American Revolution. The Senate became, as it was designed to be, a sort of aristocratic clique made up of a few men of great wealth [Senators had to possess property in excess of 1,000 pounds] who served to check and frustrate any democratic schemes that might emerge from the populace at large."[32]

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[31] Niles, Maryland Constitutional Law (Hepbron & Haydon: Baltimore, 1915), p. 4.

[32] Radoff, *supra*, at p. 44.

Maryland's early experience with a Senate elected on a basis of suffrage completely different from that of the lower House proved not to be a very salutary one. Within a few years "the disparity between the two Houses, both in terms of manner of election and of appropriate qualifications [produced] . . . serious discord."[33] Finally, after a titanic constitutional and political struggle, with the State on the brink of armed conflict, in 1837 the indirect election of Senators was abolished and the Senate made a popularly elective body by direct vote of the people, with one Senator from each county, and one from Baltimore. Radoff, *supra*, at p. 64.

Maryland's unhappy experience with two Houses elected on different or distinct bases of suffrage, disproves James Madison's assumption of 1789 and contradicts the lower court's present view, that a Senate in which population is disregarded may still be a worthwhile institution of State government. Writing in No. 63 of the Federalist Papers, Madison attempted to allay the widespread and justified fear that an indirectly elected Senate would become unresponsive to the people and aristocratic in nature. He argued:

> "If reason condemns the suspicion, the same sentence is pronounced by experience. The constitution of Maryland furnishes the most apposite example. The Senate of that State is elected, as the Federal senate will be, indirectly by the people and for a term less by one year only than the Federal Senate. It is distinguished, also, by the remarkable prerogative of filling up its own vacancies within the term of its appointment and, at the same time, is not under the control of any such rotation as is provided for the Federal Senate. There are some other lesser distinctions which would

[33] *Ibid.*

expose the former to colourable objections that do not lie against the latter. If the Federal Senate, therefore, really contained the danger which has been so loudly proclaimed, some symptoms at least of a like danger ought by this time to have been betrayed by the Senate of Maryland, but no such symptoms have appeared. On the contrary, the jealousies at first entertained by men of the same description with those who view with terror the correspondent part of the Federal constitution, have been gradually extinguished by the progress of the experiment; and the Maryland Constitution is daily deriving, from the salutary operation of this part of it, a reputation in which it will probably not be rivalled by that of any State in the Union."[34]

Despite Madison's clear but limited purpose in making the argument quoted above, the Court below concluded from those remarks that the Maryland Senate furnished the model for the United States Senate (R. 166). This is true only with respect *to the manner of indirect election* followed in each. Maryland's toleration of an indirectly elected Senate was short lived and, as previously stated, was abandoned in 1837. Bell, The Legislative Process in Maryland (Univ. of Md., 1958), p. 11.

During the early nineteenth century, several attempts were made to change the basis of representation in the General Assembly. One of the first of these was an effort made in 1805, when delegates from Baltimore City introduced a bill to add one more person to the Baltimore delegation in the House of Delegates. By that time, Baltimore had grown rapidly and already had a population larger than any of the counties, each of whom had four delegates. The bill was defeated.[35] Soon thereafter, the rapidly growing

[34] American State Papers, 43 Great Books Ed. 194.
[35] Radoff, *supra*, p. 56.

counties of Western Maryland, which embraced the cities of Frederick and Hagerstown, as well as a number of small mill and market towns, joined Baltimore in the ranks of underrepresented areas. It was in these areas that Thomas Jefferson's party enjoyed its heaviest following. However, because of the discrepancies of representation, the Federalist party was able to control the political affairs of Maryland, even though the majority of the people leaned to the Democratic-Republican party of Jefferson. For example, in 1812, according to the calculations of one Baltimore editor, the Jeffersonian party had achieved a majority of more than 2,000 votes among those cast in the elections for the General Assembly, yet the Federalists were able to obtain a majority of over two to one in each House.[36]

Between 1819 and 1828, the Federalists and their successors, the Whigs, were able to defeat several reapportionment bills introduced in the General Assembly. In successfully resisting these measures, the Federalists and Whigs expressed continued alarm over the burgeoning population of Baltimore, one third of it being foreign born and suspected "Jacobins."[37] In 1836, a bipartisan reform convention convened at Baltimore in an attempt to launch a campaign for the election of legislators of both parties pledged to reapportionment. The effort bogged down in the partisan politics generated by the election of 1836 and accomplished nothing.[38]

The next major endeavor to change the representation of the Maryland General Assembly occurred in the Constitutional Convention of 1851. In that convention, the representatives of Baltimore City and several Western counties attempted to secure representation of the House of Dele-

[36] Niles, Weekly Register (Baltimore), October 16, 1813, p. 111.

[37] Radoff, *supra*, p. 58; Steiner, Citizenship and Suffrage in Maryland, (Baltimore: Cushing and Co., 1895), p. 32.

[38] Radoff, *supra*, p. 63.

gates on the basis of population, but were defeated by a vote of 17 to 60. Failing in that, they proposed that Baltimore be given the same representation as the largest county. Again, their motion was defeated 33 to 42, the representatives of smaller counties making it clear that they were not willing to see either the City of Baltimore or the larger counties represented on the basis of population.[39]

We move next in point of history to the Constitutional Convention of 1864, which was held as a result of problems arising during the Civil War. Prior to this Convention, convened while Maryland was under the yoke of the Union Army, the strength of the smaller and generally Southern oriented counties had been weakened substantially by voting "test oaths" and through the imprisonment of some of their representatives. The Constitution approved by the 1864 Convention divided Baltimore City into three legislative districts. Baltimore City also received one Senator for each of its three legislative districts.[40]

The limited available legislative history of the 1864 Convention shows that the increasing demands for larger representation for Baltimore City, which first came to a head in the Constitutional Convention of 1851, were at least to be partially recognized.[41] The population of Baltimore in 1864 was just under 250,000. By 1870 its population had grown to 267,354, or 34% of the State's total of 780,894.[42]

The Constitutional Convention of 1867 confirmed the additional representation approved with respect to Baltimore City by the 1864 Convention. The three legislative districts of Baltimore City were continued, and each of the

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[39] Debates and Proceedings of the Maryland Reform Convention to Revise the State Constitution (Annapolis: William M'Neir, 1851), p. 118.

[40] Debates of the Constitutional Convention of the State of Maryland Assembly at the City of Annapolis, Wednesday, April 27, 1864 (Annapolis: R. P. Bayly, 1864).

[41] Bell, *supra*, at p. 14.

[42] *Id*, at p. 15.

legislative districts was given as many Delegates as the largest county.[43] By 1900, the City of Baltimore had grown to 508,957, and its proportion of the State's population had increased to 43%. In 1900, after the passage of a constitutional amendment, Baltimore was given an additional legislative district and one more Senator.[44] The available legislative history of the constitutional amendment of 1900 shows that it was proposed and approved only because Baltimore's expanding population moved the General Assembly and the people to permit the City to be given an additional legislative district and one more State Senator.[45]

By 1920 the population of Baltimore had risen to 733,826. This represented 51% of the State's total.[46] In the 1920's an extensive campaign was waged to secure additional representation for Baltimore.[47] The justification asserted for

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[43] Debates of the Maryland Constitutional Convention of 1867, compiled by Philip B. Perlman (Baltimore: Hepbron & Hayden, 1923), pp. 297-300.

[44] Bell, *supra*, p. 15.

[45] See, *e.g.*, *Baltimore Sun*, February 14, 1900, p. 8, and especially the following editorial of the *Baltimore Sun*, February 16, 1900, p. 4, col. 1:

". . . Baltimore is entitled, upon every equitable consideration, to an increased representation in the legislature . . . Its present representation, as established by the Constitution of 1867, does not rest upon any basis of principle whatever, having reference to either wealth or population further than that to the city is conceded a larger representation in House and Senate than is awarded to any county. Each of the 23 counties . . . without reference to size, taxable basis or population is awarded one Senator. Baltimore City, being divided by the Constitution into three legislative districts, each district is declared to be entitled to be similarly represented, giving to the city, therefore, three Senators out of 26. *There is no principle involved in this. The legislative districts of Baltimore City are not counties, and have none of the attributes of counties* . . . the palpable injustice of the present arrangement is self-evident. Based upon no principle, it can appeal to no principle for justification. *It violates, in fact, every principle underlying our system of republican representative government* . . ." (Emphasis supplied).

[46] Bell, *supra*, p. 15.

[47] See, *e.g.*, *Baltimore Morning Sun*, March 16, 1920; *Baltimore Morning Sun*, March 10, 1921.

such further representation in the legislature, as stated by Governor Ritchie, was the "growth of population in Baltimore" which, he argued, "entitles the City to increased representation in both houses of the General Assembly." [48] The campaign was successful. In 1922 the City of Baltimore was granted two additional districts, including two more State Senators, bringing its total to the six legislative districts and State Senators which the City now has.

In 1922, Baltimore, with 51% of the State's population, enjoyed approximately 21% of the representation provided for in the State Senate, and 31% of the representation provided for in the House of Delegates. Today, the four suburban counties, with 45% of the State's population, have less than 14% of the representation in the State Senate, and approximately 28% of that in the temporarily reapportioned House of Delegates.

Too plainly for argument, the population principle has been applied in the Maryland State Senate since 1864, at least so far as the City of Baltimore is concerned. Nevertheless, the courts below both attempted to dodge the compelling force of this historical precedent by describing Baltimore's situation as "unique" (R. 120) or justified by "special reasons" (R. 166). Actually, it was because of Baltimore's "unique" position as the only urban area of Maryland that it did not get the full representation to which it was fairly entitled by virtue of its population. However, the fact remains that the City at least was given some additional representation because of its expanding population, originally in the Convention of 1864, again in 1900, and once more in 1922. In each instance, the additional representation provided included an increase in Senate seats.

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[48] *Baltimore Morning Sun*, March 16, 1920.

Appellants ask that the present more populous subdivisions be afforded the same treatment which was extended Baltimore in the past. Indisputably, the population principle has been taken into some account as a factor in determining the composition of the Maryland State Senate. Having been applied, it must be invoked on a rational basis. Justification of its application with respect to Baltimore on three separate occasions rested on the increased population of that City. The very same reason supports appellants' argument that not to extend the population factor or principle to other more populous subdivisions of this State is to discriminate arbitrarily without any basis in reason, or, for that matter, in the words of the trial court, any basis in "history or tradition." In seeking simple equity and the elimination of invidious geographical and populative discrimination with regard to the Maryland State Senate, appellants are not, as the Attorney General, with a rhetorical flourish, has thundered, attempting "to change the form of Government of this State." Our argument is simple, historically documented and, we believe, unanswerable. Population was taken into account in the composition of the Maryland State Senate as early as 1864; it should be taken into account in 1963.

In one other important and distinctive respect, it is also established that the Federal plan or system of representation has not been adhered to in Maryland. Under the Federal Constitution, representation in the House of Representatives is based exclusively on population, except that each State is entitled to at least one Congressman. At present, there are 436 members of the House of Representatives, representing the Congressional districts of the 50 States of the Union. Only Alaska, Delaware, Wyoming, Nevada and Vermont fail to meet the minimum population prerequisites, and therefore elect only one Congressman at large. Apart

from the five States enumerated, representation in the other 45 States is in strict accordance with population.[49]

In the Maryland House of Delegates, on the other hand, representation has never been based on anything even approximating such a close ratio of population to area. For example, as previously noted, Baltimore's 1870 population was 34% of the State's total, yet the City was afforded only 21% of the representation provided in the House of Delegates. Similarly in 1920, with 51% of the State's population, Baltimore was given only 31% of the representation in the lower House.[50] At the present time, even allowing for the "stop-gap" reapportionment of the House of Delegates, the four suburban counties with 45% of the State's population, are given roughly 28% of the representation in the present 142 member House of Delegates. If there was a true Federal plan or system in effect in Maryland, the suburban counties and the City of Baltimore combined would be entitled to a minimum of 105 Delegates out of the 142 for which provision is now made. They have, however, only 79. At present, 76% of Maryland's population does not enjoy sufficient representation (86 members) to approve an amendment to the State Constitution, even in the House of Delegates. On these facts, and independently of the failure to follow the Federal scheme in the State Senate, the appellees should not be heard to argue that Maryland has adopted anything like the Federal plan of representation.

The historical facts attest to Chief Judge Brune's accuracy in stating that "strictly as a matter of history, the

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[49] Out of 436 Congressional seats, only 5, or approximately 1%, fail to meet the minimum average population requirement. In Maryland, 19 seats in the House of Delegates, or 14% of the total, come from counties having less than 26,000 in population, the minimum average. This does not take into account the substantial additional representation afforded the less populous counties without regard to population, a concession which is not made to the less populated States in the House of Representatives.

[50] Bell, *supra*, p. 5.

pattern of one senator per county or comparable political subdivision was in force [in Maryland] only from 1851 to 1864" (R. 177). They also demonstrate that population *never* has been the exclusive basis of representation in the House of Delegates. Neither history nor tradition, therefore, can be successfully relied on to argue that Maryland has adopted and adhered to a comparable system of representation as established by Article I of the Constitution of the United States.

B. *Even As A Hypothetical Analogy, The Federal Plan Fails.* The Court of Appeals of Maryland appears wedded to the notion that since the Federal system of representation appears to have worked reasonably well in the history of our national government, a federal republic, it is not unreasonable to permit the states, including Maryland, to adopt it as a basis of representation. Maryland has not observed the Federal plan. However, as we show in the next section of this brief, even if Maryland had adopted and followed a Federal plan, it would not suffice to protect the present gross disparities of representation in the Maryland State Senate from condemnation as invidious discrimination.

Extended analysis is not required to dispel the contention that a Federal plan for Maryland, or for other States of the Union, would satisfy the Fourteenth Amendment. In the first place, it seems that such a contention is more a desperate afterthought than a compelling argument. Until this Court made clear in *Baker v. Carr*, *supra*, that claims of gross disparity in the representation afforded different political subdivisions in a State legislature might constitute a violation of the Fourteenth Amendment for which judicial relief was available, the view that a two house State legislature was analogous to or patterned on the

Federal plan, if conceived, was rarely voiced.[51] Appellants find no early commentators on the structure of State government in America, writing during the period when many state constitutions were being enacted or revised, who found analogy between the two House state legislature and the Federal system.[52] As Judge Bryan of Virginia recently pointed out:

> "The bicameral system is a creature of history, and many of the reasons for its creation no longer obtain. The chief justification for bicameralism in state government now seems to be the thought that it ensures against precipitate action—imposing greater deliberation—upon proposed legislation."[53]

Actually, only eight legislative bodies are apportioned strictly according to political units of the State. These are the Senates of Arizona, Idaho, Montana, Nevada, New Jersey, New Mexico and South Carolina, apportioned by counties, and the House in Vermont, apportioned by towns.[54] Maryland is excluded from the list cited, since the six legislative districts of the City of Baltimore (all of which have one Senator each) do not constitute political units of the State. Conversely, the original constitutions of 27 States contained provisions apportioning all legislative seats according to population, and an additional

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[51] Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 Amer. Univ. L.R. 51, 73 (1963); McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 689 (1963).

[52] See, *e.g.*, Bryce, I The American Commonwealth, 484 (1917 Ed.); Tocqueville, Democracy in America (Vintage, 1955), p. 87.

[53] *Mann v. Davis*, 213 F. Supp. 577, 585 (E.D. Va., 1962), prob. juris. noted, 374 U.S. 803; see also, Luce, Legislative Assemblies (Houghton-Mifflin, 1924), pp. 47, 58, 85.

[54] *Apportionment of State Legislatures*, Report of the Advisory Committee on Intergovernmental Relations, December, 1962, p. 14, *f.n.* 55.

nine constitutions provided for a slight modification of population in one House of the legislature.[55]

Appellants will not dwell at any length on the historical and quite distinguishable basis of the Federal plan, which is extensively discussed in Professor McKay's authoritative treatment of the inapplicability of the Federal analogy to state legislative bodies. McKay, Reapportionment and the Federal Analogy (Natl. Munic. League, 1962), pp. 4-7. The Federal plan written into Article I of the Federal Constitution, as all students of American history are aware, represented an extremely reluctant compromise which the smaller States wrenched from the larger States. The former threatened "to bolt the convention" unless they won equal representation for the States in the Senate. The compromise arrived at was required "to break the convention's worst impasse." Morgan, Birth of the Republic (Univ. of Chicago, 1956), p. 141.[56] As a result, Madison says, the Senate represents "a constitutional recognition . . . of [the] sovereignty remaining in the individual States," while the people have a "proportional sh. in the government" of the United States through the representation provided in the House.[57]

The historical reasons which support the compromise which resulted in Article I of the Federal Constitution do

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[55] *Ibid*, page 35. Nebraska and the Territory of the Virgin Islands have unicameral legislatures.

[56] Farrand, The Framing of the Constitution of the United States, 105 (1913). Madison, writing in Number 62 of the Federalist Papers, confessed the Hobson's choice which the larger States were required to accept if a true Federal Union was to be formed: "A government founded on principle, more consonant to the wishes of the larger states is not likely to be obtained from the smaller states. The only option, then, for the former lies between the proposed government and a government still more objectionable. Under this alternative, the advice of prudence must be to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice." American State Papers, 43 Great Books Ed. 189.

[57] American State Papers, *supra*, p. 189.

not carry over to provide a rational basis for the grossly disproportionate representation which exists in the Maryland State Senate. Maryland is not a federated republic: it is a unitary State; it is not the "United Counties and Legislative Districts of Maryland." Its counties, and even more its legislative districts, are neither sovereign nor quasi-sovereign bodies. 6 Md. Law Encl. 497. As Chief Judge Brune noted in his dissent, and the majority below did not dispute the point, the counties and the legislative districts of Baltimore City "remain creatures of the State, and they have no . . . constitutional guarantee" of either continued existence or the exercise in the future of such powers which the State has given them in the past (R. 177).

For example, under Article XIII of the Maryland Constitution, two new counties have been created since 1867. The cases which establish the dependence of the counties on the General Assembly of Maryland are many; appellants cite only representative decisions: *Clauss* v. *Board of Education of Anne Arundel Co.*, 181 Md. 513, 30 A. 2d 779; *Howard Co. Commissioners* v. *Matthews*, 146 Md. 553, 127 A. 118. In this respect, Maryland merely illustrates the universal rule concerning the limited authority possessed by the political subdivisions of a state and their dependence on the state legislature for both their existence and their exercise of governmental powers. *Hunter* v. *City of Pittsburgh*, 207 U.S. 161, 178.

The attempted analogy of the Federal plan fails in a second and even more fundamental point of fact. The Fourteenth Amendment did not become part of our basic charter of national government until 78 years after the Constitution of the United States was ratified by the States in 1790. That amendment which, almost since its passage, has been interpreted in so many areas to have effected basic changes in the form of the government of the States, and

the powers permitted them, far from complementing or inferentially approving a Federal plan for representation for each State of the Union, points in the opposite direction. Article I, having been expressly written into the Constitution, cannot, of course, be attacked as unconstitutional, so far as the Federal Government is concerned. The Fourteenth Amendment, however, permits, and indeed sustains, a challenge to a Federal plan of representation, so far as the States are concerned, where its application would sanction, as it would in Maryland, "invidious discrimination." As Judge Black, of the Michigan Supreme Court, correctly observed in his concurring opinion in *Scholle* v. *Hare*, 360 Michigan 1, 123, 104 N.W. 2d 63, reversed and remanded, 369 U.S. 429:

> "Article I . . . [of the Federal Constitution] *guarantees inequality* of the representative value of a man's vote so far as concerns a National Senate, whereas the Fourteenth Amendment guarantees a substantial approximation of the *very opposite* within the framework of the Government of each State." (Emphasis supplied).

The issue of the so-called Federal analogy has been raised in other cases besides this. Federal courts in Virginia [58] and in Delaware,[59] have rejected the alleged analogy as a rational basis for apportionment in State legislative bodies. On the other hand, the Court below, a Federal court

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[58] *Mann* v. *Davis*, 213 F. Supp. 577 (E.D. Va., 1963), prob. juris. noted, 374 U.S. 803.

[59] *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub. nom. Roman* v. *Sincock*, No. 307. The Federal analogy also was rejected in the recent ruling of a three judge Federal court for Western Oklahoma requiring a reapportionment of both houses of the Oklahoma legislature on a population basis, *Moss* v. *Burkhart*, — F. Supp. — (W.D. Okla., 1963); *Washington Post & Times Herald*, July 18, 1963, p. A-2.

in Ohio,[60] and a lower state court in New Jersey, seem to have accepted it.[61] This Court has not passed upon the precise question. However, we hopefully read its decision in *Gray* v. *Sanders*, 372 U. S. 369, 378, to suggest that the analogy is "inapposite."

Appellants do not dispute that in a theoretical case, where the populations of the various political subdivisions of a State were approximately equal, allowing equal representation on the basis of political subdivisions in one house of a state legislature, might satisfy the requirements of the Fourteenth Amendment. However, nothing remotely like that situation exists in Maryland. Therefore, even if Maryland had adopted and adhered to a Federal plan, that would not avoid the fact that the substantial disparities of representation which now exist in the Maryland Senate violate Section 1 of the Fourteenth Amendment. It cannot be the law that gross malapportionment in either one or both houses of a state legislature is immune from the requirements of the Fourteenth Amendment by virtue of the fact that the legislative structure of a State government can be rationalized as being superficially analagous to the structure of the United States Congress. If it is, then, clearly, all efforts to obtain reasonably fair representation in the legislative chambers of Maryland and of most other States are doomed to failure.

III

Invidious Discrimination Exists With Respect to the General Assembly as a Whole

From the beginning, plaintiffs have challenged the total representation afforded in the General Assembly of Mary-

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[60] *Nolan* v. *Rhodes*, — F. Supp. — (S.D. Ohio, 1963), unofficially reported, 31 U.S. Law Wk. 2641, June 25, 1963.

[61] *Jackman* v. *Bodine* (N.J. Super. Ct.), 188 A. 2d 642, 652.

land, as well as that provided in the State Senate considered as a separate house (R. 19). The Chancellor and the Court of Appeals for Maryland apparently have elected to measure the Senate and the House of Delegates by different standards in determining whether the representation provided in each satisfies the Fourteenth Amendment. We fail to understand how a challenge under the Fourteenth Amendment against one house of a bicameral legislature can stand on any different footing than when such an attack is made on the other, or on the legislature as a whole.

The fundamental issue in this case is the value of the rights of suffrage possessed by citizens of Maryland. Ultimately this refers to the ability to pass legislation preferred by a majority. In a bicameral legislature, such as the Maryland General Assembly, the enactment of legislation requires not a majority of all the legislators in both Houses, but a successive majority of the legislators in each House. Accordingly, the appellants and other voters of Maryland similarly situated are not freed from the unconstitutional disadvantage imposed on them by gross malapportionment merely because they now have a bare majority of the House of Delegates. The unreasonable dilution of their vote in *either* the House of Delegates *or* the Senate effectively frustrates the legislative process and lays the groundwork for legislative deadlock. A majority should have the right to *pass*, not merely to block, legislation. *Cf. Sincock* v. *Duffy*, 215 F. Supp. 169, 171 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock*, No. 307.

Maryland experienced governmental frustration of a similar kind many years ago, until it was eliminated by the constitutional changes occurring in 1837, under which the members of the Maryland State Senate were popularly elected like their counterparts in the House of Delegates. Again, 125 years later, Maryland is able to provide a political scientist's case study of the consequences of the stale-

mated government which can arise when one house of a state legislature is related, at least, to population, but where (with one exception) it is not taken into account in a second and upper house. Appellants refer to the 1963 session of the Maryland General Assembly, the first session of that body following the temporary reapportioning of the House of Delegates enacted at the special session in May, 1962. Representative examples follow of what can be expected where bare majority rule exists in one house and extreme minority rule dominates in the other:

A compelling example was the Maryland General Assembly's refusal to abolish the archaic and inequitable unit rule system of selecting nominees for state-wide offices in primary elections, which had prevailed for over 50 years in Maryland until a decision of the United States District Court for the District of Maryland, entered on May 10, 1963 in *The Maryland Committee for Fair Representation et al. v. J. Millard Tawes, et al.*, C. A. No. 14452, struck it down as unconstitutional. *Baltimore Morning Sun*, May 11, 1963, p. 30. Early in the 1963 session, the recently reapportioned House of Delegates had voted to abolish the unit rule system by a vote of 122 to 9. *Baltimore Morning Sun*, January 23, 1963, p. 38. This proposal, however, was defeated in the grossly malapportioned Maryland Senate by a vote of 16 to 13. Of the majority, 15 were Senators representing the less populous counties. *Baltimore Morning Sun*, February 14, 1963, p. 46. After this Court's epochal decision in *Gray v. Sanders*, 372 U.S. 368, the House of Delegates again passed a bill to abolish the unit rule. This time the vote for passage was 121 to 3. *Washington Evening Star*, March 27, 1963, p. C-3; *Washington Post & Times Herald*, March 27, 1963, p. D-1. The controlling majority of the State Senate, however, remained adamant in its opposition, and deliberately permitted this second attempt to abolish the unit rule system to die in the closing hours of the 1963 leg-

islative session. *Baltimore Morning Sun*, April 2, 1963, p. 25; *Washington Evening Star*, April 2, 1963, p. B-2.

Another instance of the State Senate's refusal to pay even lip service to the principle of majority rule is legislation which passed the rurally dominated Senate at the last session of the Maryland General Assembly, under which the House of Delegates would have been permanently reapportioned on a basis which, in a very few years, would result in the House of Delegates being even more malapportioned than it is at present. The bill, naturally, would have left the Senate intact. *Baltimore Morning Sun*, February 5, 1963, p. 36. Fortunately, this preposterous legislation was rejected by the Judiciary Committee of the House of Delegates. *Baltimore Morning Sun*, March 26, 1963, p. 38; *Washington Evening Star*, March 26, 1963, p. B-1.

Nor did the State Senate, despite a pertinent decision of a Baltimore City Court, accept the idea that the six legislative districts of Baltimore should be reasonably equal in population as expressly required by Article III, Sec. 2, of the Maryland Constitution. Although the House of Delegates passed legislation to implement the Court's order and to meet the standards of the State Constitution, it was defeated in the Senate. *Baltimore Morning Sun*, April 2, 1963, p. 38.

Another example of the Senate's refusal to approve legislation passed by the more representative House of Delegates and apparently in the interests of the majority of the people of Maryland, is provided in its rejection of increased financial aid to the burgeoning State school system, which had passed the House by a vote of 94 to 34. *Washington Post & Times Herald*, April 2, 1963, p. B-1; *Baltimore Morning Sun*, April 2, 1963, p. 58. The bill died in the State Senate on the last day of the 1963 session of the General Assembly. *Washington Evening Star*, April

2, 1963, p. A-1. Similarly, the Senate buried a small loan bill which had passed the House of Delegates by a comfortable margin, and which would have made it easier for persons of modest means, and without established bank credit, to borrow money. *Baltimore Morning Sun*, April 2, 1963, p. 25. And in the field of conservation, proposals for the public development of Assateague Island on the Atlantic Ocean, the last large undeveloped stretch of ocean coast on the Atlantic, which twice had been approved by the House of Delegates, were bottled up and left to die in the Maryland State Senate. *Washington Post & Times-Herald*, April 5, 1963, p. C-1.

Conversely, however, recently proposed amendments to the Federal Constitution under which the jurisdiction of this Court would be radically curtailed and as a result of which the Congress could be by-passed in the amending process, received a favorable reception in the Maryland State Senate at the last session of the General Assembly. We refer here to the three proposals for amending the Constitution, all originating with the Council of State Governments.[62] One would establish a Court of the Union, composed of the State Chief Justices, with authority to review certain judgments of this Court. The second would remove jurisdiction of Federal courts over malapportionment and gerrymandering. The third would permit the Federal Constitution to be amended whenever two thirds of the State legislatures passed resolutions proposing an amendment and after three fourths of the States thereafter approved the amendment proposed.

These three proposals, all drastic, indeed revolutionary, in nature and which, if enacted, would convert our constitutional system from a Federalist Union to a Con-

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[62] *Amending the Constitution to Strengthen the States in the Federal System*, 36 State Government 10 (1963).

federation of States,[63] have been denounced by the United States Conference of Mayors, representing the urban areas where nearly 70% of the country's population resides.[64] They also have been condemned by the American Bar Association.[65] At least two members of this Court also have called for the most careful consideration and the widest possible national debate concerning the wisdom of adopting these three startling suggestions for changing our national government.[66]

Despite this, the Maryland State Senate very promptly considered and passed, by a vote of 16 to 6, the proposal to eliminate Congressional participation in the Constitutional amending process. 15 Senators, constituting a majority of the State Senate, and representing the less populous counties, voted in favor of the adoption of this radical Constitutional proposal. *Washington Evening Star*, March 26, 1963, p. B-14. Fortunately, the House of Delegates, more popularly representative of the people of Maryland, narrowly defeated the bill when it came to the floor, and the other two proposed Constitutional amendments were killed in the Judiciary Committee of the House of Delegates. *Baltimore Morning Sun*, January 28, 1963, p. 22.

The legislation discussed above constituted the bulk of the important measures considered at the 1963 session of the Maryland General Assembly.[67] Their history demonstrates the absurdity of a legislature in which the primary

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[63] See the critical discussion in Black, *The Proposed Amendment of Article V: A Threatened Disaster*, 72 Yale L.J. 958 (1963).

[64] *New York Times*, June 12, 1963, p. L-29.

[65] *New York Times*, May 22, 1963, p. 1; *Washington Evening Star*, May 22, 1963, p. A-2; *New York Times*, August 13, 1963, p. 19.

[66] *Washington Post & Times Herald*, May 26, 1963, p. E-4.

[67] The other significant items were stretched out anti-slot machine legislation, inequitable Congressional redistricting, and an "equal accommodations" law, applicable to only half of the political subdivisions of Maryland.

basis of representation in one house is population, and where the exclusive basis of representation in the other is area. We do not wish to be misunderstood; appellants do not argue for unicameralism. They agree, with many others, that the bicameral legislature has proved itself as a worthwhile mechanism of state government. Two houses tend to slow down legislation, to insure full hearings on important matters, and to temper legislative judgment by providing a second look from a different point of view. For these reasons, appellants accept the idea of a smaller State Senate, the members of which represent a broader base and more divergent constituency than those who serve in the House of Delegates. Quite properly, Senate constituencies should include larger and different population groups, as well as more diverse economic interests. One of the most knowledgeable of all the authoritative students of American government, however, has summed up the basic reasons in favor of a bicameral state legislature, and at the same time distinguished these from the quite different historical reason which explains the bicameral Congress:

> "*Reasons for Two Houses in State Legislatures. There is, consequently, no such historical reason for having two houses in the states as exists in the case of the federal government.* The object of the federal arrangement is the representation of the two elements upon which the national government rests, namely, the popular will and a federal union of states. *The state legislatures have two houses simply for purposes of deliberateness in legislation*, in order, that is, that legislation may be filtered through the debates of two coordinate bodies, representing slightly differing constituencies, though coming both directly from the people, and may thus escape the taint of precipitation too

apt to attach to the conclusions of a single all-powerful chamber. *The double organization reprgsents no principle, but only an effort at prudence.*''[68] (Emphasis supplied).

In all this, therefore, appellants plainly adhere to bicameralism, not unicameralism. However, for a bicameral legislature to operate as an effective instrument of state government, it cannot rest, as the Maryland General Assembly now does, on a structure of sharply divided and completely divergent representation, wherein one house represents people and the other represents only "geography," areas, units of local government, "history," or the once more equally populated political subdivisions of days long past.[69] Maryland has had the misfortune in its history of twice demonstrating the efficacy of that observation. One experiment ended (almost in insurrection) in 1837;

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[68] Woodrow Wilson, The State (Boston: D. C. Heath, 1898), para. 1134, pp. 487-489.

[69] As John Locke, in his treatise *Concerning Civil Government*, 35 Great Books Ed. 61, said a long time ago of the English rotten borough system:

"Things of this world are in so constant a flux that nothing remains long in the same state. Thus people, riches, trade, power, change their stations; flourishing mighty cities come to ruin, and prove in time neglected desolate corners whilst other unfrequented places grow into populous countries filled with wealth and inhabitants. But things not always changing equally, and private interest often keeping up customs and privileges when the reasons of them are ceased, it often comes to pass that in governments where part of the legislative consists of representatives chosen by the people, that in tract of time *this representation becomes very unequal and disproportionate to the reasons it was at first established upon. To what gross absurdities the following of custom when reason has left it may lead, we may be satisfied when we see the bare name of a town, of which there remains not so much as the ruins, where scarce so much housing as a sheepcote, or more inhabitants than a shepherd is to be found, send as many representatives to the grand assembly of law-makers as a whole county numerous in people and powerful in riches.* This strangers stand amazed at, and every one must confess needs a remedy; though most think it hard to find one, because the constitution of the legislative being the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people, no inferior power can alter it,

the other began in 1962, following the stop-gap reapportionment of the Maryland House of Delegates, and will persist unless this Court reverses the decision below.

Looked at as a whole, therefore, and even assuming *arguendo* that population can be disregarded completely so far as representation in the Senate is concerned, it follows that appellants' rights of suffrage in the General Assembly as an entity remain grossly diluted, despite the enactment of the temporary, "stop-gap" legislation which reapportioned the House of Delegates to give the more populous political subdivisions a slight majority. Actually, appellants' rights of representation would have been better protected by reapportioning the Senate and leaving the House of Representatives as it was before May 25, 1962. Certainly, from the point of view of the degree of malapportionment present, it was the Senate rather than the House which presented the more shocking example of a grossly unrepresentative legislative body.

What the Court of Appeals for Maryland has approved is not a "checks and balance" system, but government by paralysis. If it is reasonable to protect minority rights to the extreme of allowing a group or an area to retain

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And, therefore, the people when the legislative is once constituted, having in such a government as we have been speaking of no power to act as long as the government stands, this inconvenience is thought incapable of a remedy.

"*Salus populi suprema lex* is certainly so just and fundamental a rule, that he who sincerely follows it cannot dangerously err. If, therefore, the executive who has the power of convoking the legislative, *observing rather the true proportion than fashion of representation, regulates not by old custom, but true reason, the number of members in all places, that have a right to be distinctly represented*, which no part of the people, however incorporated, can pretend to, but in proportion to the assistance which it affords to the public, it cannot be judged to have set up a new legislative, but to have restored the old and true one, and to have rectified the disorders which succession of time had insensibly as well as inevitably introduced; for it being the interest as well as intention of the people to have a fair and equal representative, whoever brings it nearest to that is an undoubted friend to and establisher of the government, and cannot miss the consent and approbation of the community; . . ." (Emphasis supplied).

majority control of one house of a state legislature, whatever the population ratios of the political subdivisions within the State, appellants can suggest a number of groups, the members of which are as much in need of such extravagant and unreasonable protection as is now afforded the residents residing in the less populous subdivisions of Maryland. For example, 17% of the people of Maryland are non-white. By the logic on which the decision below rests, their rights can only be protected by giving them majority control of one branch of the General Assembly of Maryland!

For better or for worse, the people of the United States and, if given the chance once again, the people of Maryland, follow the principle of majority rule. It may be that democracy is no more than the "recurrent suspicion that more than half the people are right more than half of the time."[70] Nevertheless, it is the overriding principle which we believe the Fourteenth Amendment requires be observed in the composition of the legislative bodies of the States. The basic purpose in having a two-house state legislature is to insure that it is *more*, not *less*, representative of the body politic. Accordingly, minority rule, even if allowed in just one house of a state legislature, stultifies the legislative process, robs the principle of majority rule of any working vitality, and flouts both equal protection and due process of law. It is true, that many clever philosophical defenses of minority rule and government by an elite have been made throughout the ages. Plato's Republic is a classic example.[71] However, there are few Platos in the

[70] Mayo, An Introduction to Democratic Theory (Oxford Univ., 1960), pp. 174-175.

[71] Plato, *Republic*, 7 Great Books Ed., 295. For a criticism of Plato's theory of minority rule by a philosophical elite, see Russell, History of Western Philosophy (Simon and Schuster: N.Y., 1945), p. 108. Russell seems to have his own views about the elite (intellectual) that should have political power. That is the basic difficulty with minority rule—which minority is to be preferred?

less populous areas of Maryland; just about as many as are found elsewhere. Fortunately, the absence of such rare philosopher kings need not trouble us. Long ago this nation, as well as Maryland and the other states, accepted the principle of majority rule. After a long struggle, it has been restored in the House of Delegates, albeit on a thin and temporary basis. The time has come to permit the reintroduction of it in the Maryland State Senate, as originally contemplated by the reform of that body enacted in 1837. Radoff, *supra*, at p. 64.

IV

Applicable Standards and Effective Relief

A. *Applicable Standards.* An advocate's usual and primary obligation is to attempt to win his client's case within the bounds of the law, legal ethics and good taste. Very rarely, if ever, is he expected to argue for general standards to apply, not only in the litigation in which he is immediately involved, but in future cases as well. However, we realize that the reapportionment cases now before the Court raise fundamental issues of first impression. The Court, therefore, may be interested in hearing from counsel on the general standards which it might wish to lay down to control in apportionment cases. For that reason only, we digress slightly from the main stream of our argument to place before the Court appellants' views concerning the standards that might be taken into account when passing upon a claim that the representation provided in a state legislature violates the Fourteenth Amendment to the Constitution of the United States.

There can be little doubt that the most equitable standard, and the simplest to apply in all cases, is the "one man, one vote" concept which this Court laid down in *Gray* v. *Sanders, supra.* There may be differences which serve to dis-

tinguish the electoral from the representative process. For our part, however, we do not perceive these differences to be substantial. Therefore, if it were necessary to carry their case, appellants would repeat what was said earlier in this brief and argue that the concept of equality in suffrage rights requires that a strict population standard be adhered to in both Houses of the Maryland General Assembly, where it does not now prevail as to either.[72]

However, if the differences between voting in a statewide primary and voting for representatives to a state legislature are thought to justify some departure from the strict principle of electoral equality in the latter situation, then perhaps some slightly different standards may be observed in reapportionment cases. In appellants' view, however, the applicable standards ought to be no less than these:

(1) Whatever the minimum requirements of the Fourteenth Amendment in reapportionment cases, they must be the same everywhere; the Fourteenth Amendment binds all the States and can require no more or no less of Maryland than it does of Delaware, Oklahoma or Virginia.

(2) The constitutionality of the representation in a state legislature cannot depend on the fact that it is the result of legislative inaction rather than affirmative action; it is settled law that legislation which was constitutional when passed may become unreasonable as a result of changing conditions, *Baker* v. *Carr*, 369 U.S. 186, 254.

(3) The presence of a provision of a state constitution or statute requiring equitable apportionment of representa-

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[72] A three judge District court in Delaware seems to have adopted the strict population standard, with minor deviations in the Senate, for the State of Delaware. *Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963). As previously noted, a three judge Federal court in Western Oklahoma also has required reapportionment of both Houses on a strict population basis. *Moss* v. *Burkhart*, — F. Supp. — (W.D. Okla., 1963).

tion is of no consequence in determining whether or not an existing system of representation violates the Fourteenth Amendment; it is axiomatic that a violation of state law neither makes nor mars a violation of the Federal Constitution. *Snowden* v. *Hughes*, 321 U.S. 1, 11; *Nashville, C. & St. Louis R.* v. *Browning*, 310 U.S. 362, 363.

(4) Neither the true nor the theoretical availability of the initiative, the possibility of direct resort to the referendum process, or the opportunity for a constitutional convention as remedies against malapportionment, can save gross disparities in representation from condemnation as violations of the Fourteenth Amendment, whatever effect might be accorded to the presence of these political remedies in determining, in a particular case, whether a Federal court should grant injunctive relief against an unconstitutional malapportionment.[73]

(5) Under *all* circumstances, representation in at least one house of a state legislative body must be based *exclusively* on population. *Toombs* v. *Fortson*, 205 F. Supp. 248 (N.D. Ga., 1962). *Cf.*, Cox, *Current Constitutional Issues*, Address before the Tennessee Bar Association, Nashville, Tenn., June 8, 1962, p. 3.

(6) Under *no* circumstances, should the extent of permissible deviation from a strict population standard in a *second* house of a state legislature deny what may fairly

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[73] Professor McCloskey has advanced the interesting, but, we believe, unsupportable thesis that, in entering the so-called "thicket" of reapportionment, the judiciary should restrict itself to "procedural" considerations, that is, "whether the ultimate constituent power was being allowed an opportunity to express itself." McCloskey, *The Reapportionment Case*, 76 Harv. L.R. 54, 71-73 (1962). Appellants refuse to believe that fundamental voting rights, guaranteed by the Fourteenth Amendment, are to be judicially protected *only* in those situations where the majority has not been given the opportunity to say whether or not they should be upheld. However, even if this unique and restrictive understanding of the nature of the suffrage were sound law, the result in this case would be no different. The "constituent power" in Maryland, *i.e.*, the people, has not had a chance to express itself since 1867.

be regarded as a substantial majority of the citizens of a State from constituting a constitutional majority in that house. Hanson, *Courts in the Thicket: The Problem of Judicial Standards in Apportionment Cases*, 12 Amer. Univ. L.R. 51, 79-80 (1963).[74]

(7) Although population need not be the exclusive criterion in the second house in all situations, irrelevant considerations, such as area and geography, the amount of direct taxes paid,[75] "history and tradition," or special recognition for various economic or ethnic interests,[76] should *not* suffice to justify disparities of representation, whatever the percentage of the deviations which would result from application of the above listed extraneous factors.

(8) In *isolated* circumstances, the long-continued existence of important instrumentalities of American local self-government, such as counties or towns, perhaps might serve to excuse *slight* deviations from the strict population standard in *one* house of a legislature, *provided* that population "remains the strongly dominant factor" therein.[77]

(9) In permitting *minimum* recognition for units of local self-government in *one* house of a state legislature in unusual and compelling instances, in *no* event should the dis-

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[74] ". . . when the percentage [of population represented by a majority of members] slips below 45%, it can be suspected that there is substantial room for improvement in achieving reasonable equality of representation in the districting plan." David and Eisenberg, *Some Practical Issues in the Wake of Judicial Decision*, paper presented at the 58th Annual Meeting of the American Political Science Assoc., Washington, D.C., September 5, 1962, p. 8.

[75] *cf. Levitt* v. *Maynard*, 104 N.H. 243, 182 A. 2d 897, where such a system with respect to the New Hampshire Senate was sustained as not irrational, but under which, interestingly enough, the three largest cities of the State are slightly over-represented. *Id.* at 898.

[76] McKay, *Political Thickets and Crazy Quilts; Reapportionment and Equal Protection*, 61 Mich. L.R. 645, 696 (1963).

[77] McKay, *supra*, p. 700.

parities in representation which result therefrom be allowed to exceed a ratio of 1½ to 1. *Cf., Sincock* v. *Duffy*, 215 F. Supp. 169 (Del., 1963), appeal pending This Term, *sub nom. Roman* v. *Sincock*, No. 307.

(10) When the above slight disparities are tolerated, they should *not* be permitted as between areas of the *same class*, i.e., urban, but only as between different types or classes, i.e., urban and rural. *Cf. Baker* v. *Carr*, 369 U. S. 186, 254.

(11) The burden of proof should be on the state to justify the disparities for which relaxation of the strict population standard is sought. *Lisco* v. *McNichols*, 208 F. Supp. 471, 476 (D. Colo., 1962).

This Court has not as yet marked out the guidelines by which it will implement its monumental decision in *Baker* v. *Carr*. Diffidently, appellants hope that, should the Court not adhere to the principle of "one man, one vote" in reapportionment cases, then the standards suggested above might merit some consideration by the Court in arriving at a final determination of the problem. Still, however minimal the standards ultimately approved by this Court, it seems beyond argument to appellants that the gross disparities of representation now permitted in the Maryland General Assembly violate Section 1 of the Fourteenth Amendment, especially in respect of the State Senate. Therefore, unless the Court really meant no more than to establish a procedural point in *Baker*, and Professor Bickel is thus confirmed in his concern that this Court may be "unable to formulate a dominant principle applicable to legislative apportionment,"[78] the decision below surely cannot stand.

B. *Effective Relief Is Available.* There is no danger of impotent judicial relief in this case, should the Court

[78] Bickel, *Durability of Colgrove* v. *Green*, 72 Yale L. J. 39, 43 (1962).

agree that the Court of Appeals of Maryland is in error in approving as constitutional the representation now provided in the General Assembly of Maryland. The history of these proceedings is proof of that. Following this Court's decision in *Baker* v. *Carr*, an earlier opinion of the Maryland Court of Appeals in this case, 228 Md. 412, 180 A. 2d 656, and the ruling by the trial court that the representation formerly provided in the Maryland House of Delegates was in violation of the Fourteenth Amendment, the General Assembly acted speedily to rectify the defect, at least in part. The experience of over fifteen other states has been the same. Decisions of state and federal courts, whether voiding existing apportionment legislation, or asserting jurisdiction to do so, have been quickly followed by the passage of at least some apportionment legislation by the states concerned.[79]

Accordingly, appellants are confident that an authoritative decision by this Court should produce reasonably prompt reapportionment by the Maryland General Assembly. Of course, the judicial *minimum* will be the legislative *maximum*. And in the absence of a controlling decision by this court, it is demonstrably futile to hope that the Maryland General Assembly, or any other State legislature, will take effective steps to reapportion itself in an equitable manner. A favorable holding, on the other hand, will bolster both the determination and the ingenuity with which the lower courts of the country have thus far tackled and seem to have solved the problem of the relief to be granted in a successful reapportionment suit.

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[79] McKay, *supra*, pp. 706-710; *Washington Post & Times Herald*, March 24, 1963, p. C-1.

Conclusion

For the reasons stated herein, appellants respectfully request that the Court reverse the judgment of the Court of Appeals of Maryland, and remand the case there. They further ask that it mandate that Court to direct the Circuit Court for Anne Arundel County to enter an order declaring Article III, Section 2, of the Maryland Constitution to be in violation of the Fourteenth Amendment, instructing the Chancellor to retain jurisdiction of the case pending corrective action on the part of the Maryland General Assembly with respect to the representation now provided in both the Senate and House of Delegates thereof, with further authority in the trial court to issue such injunctive relief as subsequently might be required should the General Assembly of Maryland not act prior to January 1, 1966.

Respectfully submitted,

ALFRED L. SCANLAN,
9806 Singleton Drive,
Bethesda, Maryland.

JOHN B. WRIGHT,
12 Church Circle,
Annapolis, Maryland.

SHEA & GARDNER,
734 15th Street, N.W.,
Washington 5, D.C.

JOHNSON BOWIE,
22 West Pennsylvania Ave.,
Towson 4, Maryland.

Of Counsel.

Attorneys for the Appellants.

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APPENDIX A

1. Section 1 of the Fourteenth Amendment to the Constitution of the United States provides that:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. Article III, Section 2, of the Maryland Constitution provides that:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election, subject to the classification of Senators hereafter provided for.

3. Article III, Section 5, of the Maryland Constitution (now inoperative) provided that:

> Notwithstanding the provisions of Section 4 of this Article, the membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties,

four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince Georges, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

4. Chapter 1, Acts of the Special Session, Maryland General Assembly, May, 1962, now Art. 40, Sec. 42, Code of Md. (1962 Supp.), reads as follows:

AN ACT to add a new Section 42 to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", revising the provisions concerning the membership of the House of Delegates and the representation of the several political sub-divisions therein, making provision for the nomination and election of certain candidates for office in the House of Delegates, ~~MAKING AN EMERGENCY APPROPRIATION TO THE BOARD OF PUBLIC WORKS FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1963, TO BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS TO PAY A PORTION OF THE COST OF SPECIAL PRIMARY ELECTIONS FOR THIS PURPOSE,~~ and relating generally to the membership and election of the members of the House of Delegates of Maryland ~~AND TO AN EMERGENCY APPROPRIATION FROM THE STATE TREASURY FOR THE PAYMENT OF A PORTION OF THE COST OF SPECIAL ELECTIONS UNDER THIS ACT~~.

SECTION 1. *Be it enacted by the General Assembly of Maryland*, That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment", and to read as follows:

42.

(a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.

(b) ~~After and based upon the final official publication of the Federal census of 1970, and after such publication of each decennial Federal census thereafter, there~~ THERE *shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.*

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as

determined by each official decennial Federal census, shall be in accordance with the following formula:

~~*The total population of the State according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed to the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the State and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.*~~

THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER SIXTY-FIVE (65). THE RESULTING QUOTIENT, COMPUTED AS THE NEAREST WHOLE NUMBER, IS THE UNIT OF POPULATION NECESSARY FOR AN ADDITIONAL DELEGATE. THE UNIT OF POPULATION, AS DIVISOR, SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND OF EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY WHICH HAS A POPULATION IN EXCESS OF THE UNIT OF POPULATION. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN ADDITIONAL NUMBER OF DELEGATES EQUAL TO THE RESULTING QUOTIENT IN EACH INSTANCE, DROPPING ANY FRACTIONAL REMAINDER. IF THE TOTAL NUMBER OF DELEGATES SO APPORTIONED IS

FEWER THAN ONE HUNDRED AND TWENTY-THREE (123), ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE LAST MENTIONED QUOTIENTS HAVE BEEN COMPUTED, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.

~~THE TOTAL POPULATION OF THE STATE ACCORDING TO THE CENSUS SHALL BE DIVIDED BY THE NUMBER ONE HUNDRED AND TWENTY-THREE (123). THE RESULTING QUOTIENT, TAKEN TO THE NEAREST FIGURE OF AN EVEN THOUSAND, IS THE UNIT OF POPULATION UNTIL A SIMILAR COMPUTATION IS MADE FOLLOWING THE NEXT CENSUS. THE UNIT OF POPULATION SHALL THEN BE DIVIDED INTO THE POPULATION OF EACH COUNTY IN THE STATE AND EACH LEGISLATIVE DISTRICT OF BALTIMORE CITY. EACH COUNTY AND LEGISLATIVE DISTRICT SHALL RECEIVE AN AGGREGATE NUMBER OF DELEGATES (WHICH INCLUDES ITS MINIMUM OF TWO DELEGATES) AS ITS POPULATION EXCEEDS THE NUMBER OF UNITS OF POPULATION LISTED IN THE FOLLOWING SCHEDULE:~~

~~WHEN THE POPULATION OF THE COUNTY OR LEGISLATIVE DISTRICT EXCEEDS THIS NUMBER OF UNITS OF POPULATION~~	~~THE COUNTY OR LEGISLATIVE DISTRICT IS ENTITLED TO THIS TOTAL NUMBER OF DELEGATES~~
~~ONE UNIT SUBDIVISIONS~~	
~~2~~	~~3~~
~~3~~	~~4~~

TWO UNIT SUB-DIVISIONS	
4	5
6	6
8	7
THREE UNIT SUB-DIVISIONS	
10	8
13	9
16	10
FOUR UNIT SUB-DIVISIONS	
19	11
23	12

ALSO, FOR EVERY FOUR ADDITIONAL UNITS OF POPULATION IN EXCESS OF TWENTY THREE UNITS, THE COUNTY OR LEGISLATIVE DISTRICTS SHALL RECEIVE ONE ADDITIONAL DELEGATE.

IF THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING MORE THAN ONE UNIT OF POPULATION AND HAVING THE HIGHEST FRACTIONAL SHARE OF A UNIT OF POPULATION AS A REMAINDER AFTER THE QUOTIENTS HAVE BEEN COMPUTED IN APPLYING THE TABULAR FORMULA ABOVE, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY THREE (123) DELEGATES IS APPORTIONED.

IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION, REMAINDERS FOR COUNTIES OR LEGISLATIVE DISTRICTS UNDER THE FOUR SUB-HEADINGS IN THE TABULAR FORMULA ABOVE SHALL BE

~~GIVEN WEIGHTED VALUES AS FOLLOWS: FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "ONE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY FOUR; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "TWO UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY THREE; FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "THREE UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY TWO; AND FOR COUNTIES AND LEGISLATIVE DISTRICTS WHICH ARE "FOUR UNIT SUB-DIVISIONS," THE REMAINDER POPULATION SHALL BE MULTIPLIED BY ONE. THESE WEIGHTED VALUES (AND NOT THE SIMPLE ARITHMETIC VALUES) THEN SHALL BE USED IN COMPUTING THE "HIGHEST FRACTIONAL SHARE" OF A UNIT OF POPULATION IN AWARDING ADDITIONAL DELEGATES AS REMAINDERS.~~

~~IF AFTER ALL THESE COMPUTATIONS THE TOTAL NUMBER OF ALL DELEGATES SO APPORTIONED IS FEWER THAN ONE HUNDRED AND TWENTY-THREE (123) DELEGATES, ADDITIONAL DELEGATES SHALL BE AWARDED IN DESCENDING ORDER OF POPULATION TO THOSE COUNTIES OR LEGISLATIVE DISTRICTS HAVING A POPULATION LESS THAN ONE UNIT OF POPULATION, UNTIL THE TOTAL OF ONE HUNDRED AND TWENTY-THREE (123) DELEGATES IS APPORTIONED.~~

(d) Not later than December 31, 1965, the Governor shall make the estimations of population and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 ~~AND THE YEAR 1970~~ *shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this sub-section; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.*

(e) Notwithstanding anything to the contrary in sub-sections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in November, 1962, AND FOR ANY ADDITIONAL PERIOD DURING WHICH THIS SECTION MAY BE EXTENDED *each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c)* BASED UPON THE FEDERAL CENSUS OF 1960 *shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.*

~~*(f) In accordance with the formula in sub-section (c), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.*~~

~~*(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional memberships herein created. These nominations shall be made prior to August 1, 1962.*~~

(F) IN ACCORDANCE WITH THE FORMULA IN SUB-SECTION (C), THE NUMBER OF ADDITIONAL MEMBERSHIPS IN THE HOUSE OF DELEGATES, FOR WHICH NOMINATIONS ARE TO BE MADE BY THE LOCAL CENTRAL COMMITTEES, IS AS FOLLOWS: ANNE ARUNDEL COUNTY, 1; BALTIMORE COUNTY, 7; MONTGOMERY COUNTY, 4; PRINCE GEORGE'S COUNTY, 4; THIRD DISTRICT OF BALTIMORE CITY, 2; FIFTH DISTRICT OF BALTIMORE CITY, 1.

(G) THE LOCAL CENTRAL COMMITTEE OF EACH PARTY WHICH WAS ELECTED ON MAY 15, 1962, IN THE SEVERAL COUNTIES OR LEGISLATIVE DISTRICTS RESPECTIVELY, SHALL NOMINATE PERSONS AS CANDIDATES FOR THE HOUSE OF DELEGATES FOR THE ADDITIONAL MEMBERSHIPS HEREIN CREATED. THESE NOMINATIONS SHALL BE MADE PRIOR TO AUGUST 1, 1962.

~~(F) (I) IN THOSE COUNTIES AND LEGISLATIVE DISTRICTS FOR WHICH THERE IS AN INCREASE IN REPRESENTATION, A SPECIAL PRIMARY ELECTION, BUT ONLY FOR SUCH INCREASED REPRESENTATION IN THE HOUSE OF DELEGATES, SHALL BE CONDUCTED ON TUESDAY, JULY 17, 1962. CERTIFICATES OF CANDIDACY FOR THIS PRIMARY ELECTION SHALL BE FILED NOT LATER THAN MIDNIGHT ON MONDAY, JUNE 11, 1962. THE FINAL TIME TO WITHDRAW AS A CANDIDATE IS MIDNIGHT ON FRIDAY, JUNE 15, 1962. THIS ELECTION IS DECLARED TO BE A "PRIMARY ELECTIONS" WITH RESPECT TO PROVISIONS IN ARTICLE 22 OF THIS CODE, TITLE "ELECTIONS" WHICH CONCERNS THE REGISTRATION OF VOTERS.~~

~~(II) EXCEPT AS IN THIS SECTION OTHERWISE SPECIFICALLY PROVIDED, THE PROVISIONS OF SAID ARTICLE 22 CONCERNING THE REGISTRATION OF VOTERS AND THE CONDUCT OF PRIMARY ELECTIONS IN THIS STATE AND IN THE RESPECTIVE POLITICAL SUB-DIVISIONS OF THIS STATE APPLY WITHIN THE PARTICULAR POLITICAL SUB-DIVISIONS IN WHICH THE SPECIAL PRIMARY ELECTIONS ARE HELD.~~

~~(III) THE BOARD OF SUPERVISORS OF ELECTIONS IN EACH SUCH POLITICAL SUB-DIVISION, AND ALL OTHER OFFICIALS AND EMPLOYEES OF THIS STATE AND OF THE RESPECTIVE POLITICAL SUB-DIVISIONS, SHALL DO THOSE THINGS~~

~~WHICH ARE NECESSARY AND PROPER TO ARRANGE FOR AND CONDUCT THESE SPECIAL PRIMARY ELECTIONS.~~

~~(IV) THERE IS APPROPRIATED TO THE BOARD OF PUBLIC WORKS, AS AN EMERGENCY APPROPRIATION FROM THE GENERAL FUND SURPLUS OF THE STATE TREASURY FOR THE FISCAL YEAR ENDING JUNE 30, 1962, THE SUM OF TWO HUNDRED THOUSAND DOLLARS ($200,000). THIS APPROPRIATION SHALL BE USED IN WHOLE OR IN PART BY THE BOARD OF PUBLIC WORKS FOR THE PAYMENT OF ONE-HALF OF THE COST OF THE SPECIAL ELECTION IN EACH OF THE SEVERAL COUNTIES AND LEGISLATIVE DISTRICTS IN WHICH UNDER THE PROVISIONS OF THIS SECTION CERTAIN ADDITIONAL CANDIDATES ARE TO BE NOMINATED FOR MEMBERSHIP IN THE HOUSE OF DELEGATES. IF ANY PORTION OF THIS APPROPRIATION IS NOT EXPENDED ON SEPTEMBER 30, 1962, IT SHALL REVERT TO THE GENERAL FUNDS OF THE STATE TREASURY.~~

~~(G) (h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for~~

(H) THE NOMINEES, IN THE RESPECTIVE NUMBERS INDICATED IN SUB-SECTION (F), SHALL BE SO DECLARED. THEY SHALL BECOME NOMINEES FOR *the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the* ~~*local central committees*~~ ~~SPECIAL PRIMARY ELECTIONS PROVIDED FOR HEREIN~~ LOCAL CENTRAL COMMITTEES *who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of*

Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.

~~(H)~~ (I) ~~(i)~~ *Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.*

~~(I)~~ (J) ~~(j)~~ *This section establishes the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.*

SEC. 2. *And be it further enacted*, That this Act shall take effect on June 1, 1962. IF THIS ACT HAS NOT ALREADY BEEN SUPERSEDED BY AN AMENDMENT TO THE CONSTITUTION OF MARYLAND UNDER THE PROVISIONS OF SUCH SUB-SECTION (J) HEREINABOVE, IT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1966; PROVIDED, HOWEVER, THAT IF AT THE GENERAL ELECTION IN THE MONTH OF NOVEMBER 1964 THERE IS SUBMITTED TO THE VOTERS OF THE STATE OF MARYLAND A PROPOSED CONSTITUTIONAL AMENDMENT WHICH WOULD SO SUPERSEDE THE PROVISIONS OF THIS SECTION, AND IF AT THAT TIME THE VOTERS OF THE STATE OF MARYLAND REJECT AND DO NOT RATIFY THIS PROPOSED CONSTITUTIONAL AMENDMENT AND THE PROVISIONS OF THIS ACT SHALL EXPIRE AUTOMATICALLY AND WITH NO FURTHER ACTION REQUIRED BY THE

GENERAL ASSEMBLY OF MARYLAND ON JANUARY 1, 1970. IN THE EVENT THERE IS SUCH AN AUTOMATIC REPEAL OF THIS SECTION EITHER IN 1966 OR 1970 AS PROVIDED HEREINABOVE, THE MEMBERSHIP OF THE HOUSE OF DELEGATES OF MARYLAND THEREAFTER SHALL BE THE SAME AS IT WAS IN THE SEVERAL POLITICAL SUB-DIVISIONS AND IN ITS ENTIRETY ON JANUARY 1, 1962. NOTHING IN SUCH A REPEAL EITHER IN 1966 OR 1970 SHALL AFFECT THE ELECTION, TENURE, POWERS, PRIVILEGES, AND DUTIES OF ANY MEMBER OF THE HOUSE OF DELEGATES IN OFFICE AT THE TIME OF THE REPEAL FOR THE REMAINDER OF THE TERM FOR WHICH HE HAS BEEN ELECTED.

Approved May 31, 1962.

(7694-3)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., *Appellants*

v.

J. MILLARD TAWES, GOVERNOR, ET AL., *Appellees*

On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

ROBERT G. TOBIN, JR.
County Attorney for Montgomery County

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

Attorneys for Montgomery County, Maryland

County Office Building
Rockville, Maryland
279-1338

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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On Appeal from the Court of Appeals of Maryland

BRIEF AMICUS CURIAE OF MONTGOMERY COUNTY, MARYLAND

INTEREST OF AMICUS CURIAE

This brief is filed pursuant to Rule 42(4) of the Rules of this Court. Montgomery County, Maryland, appeared by brief and by argument as Amicus Curiae in the trial court and by brief in the Court of Appeals of Maryland, as well as by jurisdictional brief before this

Court. Montgomery County is a political subdivision of the State of Maryland, and this brief is submitted by its authorized law officers. Charter of Mont. Co., Art. IV, § 3, Mont. Co. Code 1960.

Of the 23 Counties in the state, Montgomery is third in population with over 400,000 persons as of August 1, 1963 (1960 Census as modified by Maryland-National Capital Park and Planning Commission) and ranks sixth in total geographical size at 506 square miles. Md. Manual 1961-62, p. 625. In land area (as opposed to water area) the County ranks fifth with 493 square miles. *Ibid.* When the six geographically largest counties are compared by populations, Montgomery County stands second only to Baltimore County. *Id.* at pp. 625 & 629.

For at least the last four years, Montgomery County has had the highest median family income of any county in the United States. U. S. Census 1960 and yearly follow-ups. Over 11% of the people of Maryland live in Montgomery County; they pay 19% of the total state income tax. Report of Comptroller, State of Maryland, 1960, published Feb. 15, 1962.

The issues presented in the instant case are of vital interest to, and vitally affect, the government and all of the citizens of the County. Montgomery County, as an expanding urban-suburban county making up part of the Washington Metropolitan Area, must have fair and equal representation in the state legislature in order to assert the needs and interests of its people, to meet the great challenges with which it and the State of Maryland are faced, to provide for its citizens the services of government and the improvements in urban, suburban, and agricultural living to which they are entitled.

Efforts for relief within the state have proved futile or at best only temporarily hopeful. See Art. 40, § 42, Ann. Code Md. (1957), as amended (1962 Cum. Supp.) for temporary reapportionment of House of Delegates until 1966. Montgomery County has joined with appellants in their battle for fair representation at all levels in all three branches of the state government. Now, state legislative and judicial avenues to fair representation have been closed to further passage. It remains to pursue the matter to this Court.

ARGUMENT

The Maryland Court of Appeals By Its Decision Below Has Permanently Approved Representation in the Senate and in the General Assembly of Maryland as a Whole at an Increasing Invidiously Discriminatory Ratio in Violation of the 14th Amendment of the United States Constitution, and This Court is the Only Relief for a Determination of the Question

This case comes before the Court from the decision below, which held, in effect, that if one house of the state legislature is barely apportioned on the basis of population, the other house constitutionally may be apportioned solely geographically without regard to population. *Maryland Committee for Fair Representation* v. *Tawes*, 229 Md. 406, 184 A. 2d 715 (1962).

The precise legal framework of this decision is as follows:

Sections 2 and 5 of Article III of the Maryland Constitution were ratified by the electorate of Maryland on November 7, 1956, permanently dividing the membership of the Senate and House of Delegates of Maryland among the twenty-three counties and the City of Baltimore without regard to population and making no pro-

vision for future reapportionment of either house on the basis of population.

The amendments were submitted to the electorate with *fourteen pages of miscellaneous changes to the Constitution in one ballot question* "For the Constitutional Amendments" or "Against the Constitutional Amendments". Ch. 99, Laws of Md. 1956.

With this indistinguishable package; the voters unknowingly approved invidiously discriminatory representation in both Houses and fastened to the detriment of the majority of the state population, control in a handful of representatives from counties of small population.

Prior to *Baker* v. *Carr*, 369 U.S. 186 (1962), the Maryland Court of Appeals heard argument but did not act in this case on the reapportionment question. After *Baker* v. *Carr, supra,* and reargument, the Court of Appeals reversed and remanded a state circuit court ruling upholding the two sections in question. *Maryland Comm.* v. *Tawes,* 228 Md. 412, 180 A.2d 656 (1962) Subsequently, Section 5 of Article III of the Maryland Constitution was declared invalid, but the Court of Appeals by a 4 to 3 decision upheld the validity of Section 2 of Article III, permanently fixing the representation in the Senate of Maryland at one senator for each county and six for Baltimore City, without regard to population. *Maryland Comm.* v. *Tawes,* 229 Md. 406, 184 A. 2d 715 (1962).

The question which appellants and Montgomery County request this Court to examine is the validity of Section 2 of Article III establishing Senatorial representation in Maryland and the validity of the representation of the General Assembly as a whole in

which there is no reasonable relation between the numbers of citizens and representation in the state legislature.

Under this decision of the Maryland Court of Appeals there continues to be legislative discrimination against Montgomery County. Montgomery County is a chartered county—one of only two in the state. It is a creature of the Constitution of Maryland, Md. Const. Art. XI-A., and its powers are strictly delimited and defined by the General Assembly under authority of the Maryland Constitution. Although the majority opinion of the Court of Appeals, 229 Md. 406, 184 A.2d 715 (1962) *supra*, describes local autonomy of Maryland's counties, the reverse is true. Montgomery County operates at the sufferance of the state, its powers and citizens absolutely subject to the ultimate control of the legislature. Article XI-A, Sec. 2 of the Maryland Constitution provides in pertinent part:

> The General Assembly . . . shall by public general law provide a grant of express powers for such County . . . as may hereafter form a charter under the provisions of this Article. Such express powers . . . shall not be enlarged or extended by any charter . . . but such powers may be extended, modified, amended or repealed by the General Assembly.

The County can pass no law in conflict with the public general law of Maryland. Md. Const. Art. XI-A, § 3. By simple majority in each house of the legislature, any of the powers expressly granted to Montgomery County by Art. 25A, Ann. Code Md. (1957) (The Express Powers Act) can be repealed. Md. Const. Art. III, § 28.

The unequal composition of the Senate (and consequently the unequal composition of the Assembly as a whole when viewed realistically) has an immediate impact on the way in which state funds are allocated to the counties. As a typical example, gasoline tax revenues are so divided that the state receives 50%, Baltimore City gets 30%, and the remaining 20% is allocated to the 23 counties. Art. 56, § 137 and Art. 89B, §§ 32-34, Ann. Code Md. (1957). Maryland county programs are absolutely dependant on distribution formulas for state funds, education being a foremost example, and no hope of changing the state laws is forthcoming unless a fair reapportionment of the legislature is effected.

As permanently fixed by Section 2 of Article III of the Maryland Constitution, each of the counties has one state senator. (Baltimore City has six, one for each legislative district.) The 23 counties vary in population from approximately 15,500 to more than 500,000. Prior to 1962, Montgomery County had six delegates to the state House of Delegates, but during a special session of the legislature in May of 1962, under pressure of the courts, its representation in the House was increased temporarily to 10. Ch. 1, Laws of Md. 1962, 2d Spec. Sess.; Art. 40, § 42, Ann. Code Md. (1963 Cum. Supp.) It serves no Constitutional purpose to correct the inequities in the House of Delegates without at the same time realigning the representation in the Senate. The absurdity of votes in a slightly representative House being nullified by a grossly malapportioned Senate need be considered only once.

On the basis of the 1960 Census, Montgomery County's population was 340,928 (now estimated at over 400,000) of the Maryland state total of 3,100,689, or approximately 11% of the state total. With over

one-tenth of the state population, the County has but one-twenty-ninth of the vote in the Maryland Senate and but one-fourteenth of the vote in the House of Delegates, as the House was recently reapportioned under court mandate on May 31, 1962. Art. 40 § 42, Ann. Code Md. (1963 Supp.), *supra*.

Even under this temporary lower house reapportionment, which expires automatically on January 1, 1966, unless three-fifths of each house of the General Assembly subsequently approves submission of a referendum to the state electorate, there is purposeful and systematic discrimination against the citizens of the County which reduces their rightful representation in the state legislature, denies them a full vote in equality with other voters and is a denial of equal protection under the first section of the 14th Amendment of the United States Constitution.

The lone Senator from Montgomery County represents more than 24 times as many persons as the Senator from Kent County—and every year the population increase of Montgomery County exceeds the entire present population of Kent County. Despite its already remarkable growth, Montgomery County's projected population reveals that absent overall reapportionment, the legislative discrimination against the County will be all the more discriminatory in 1965, 1970 and beyond. Already in the three years since the 1960 census, Montgomery County has added about 60,000 persons. Since 1960, Montgomery County has added more than double, or approximately double, the entire separate populations of Calvert, Caroline, Dorchester, Garrett, Kent, Queen Anne's, Somerset, Talbot, and Worcester Counties. Yet each of these nine counties enjoys equal senatorial representation

with Montgomery. In 1962, the Maryland-National Capital Park and Planning Commission projected that by 1970 Montgomery County would total more than a half-million people; by 1980, 643,400; and by the year 2000, County residents would number 995,000. Montgomery, however, has increased in population far beyond predictions, and the Commission currently is revising upward its population expectations. The County exceeded 400,000 by August 1, 1963.

The irrational unreality of apportionment in the General Assembly even under the temporary reapportionment exists not merely between those subdivisions of large and small population, but shows its purposelesness in subdivisions of comparative population and characteristics. For example, Charles County, with a 1960 census of 32,572, has two delegates; but Dorchester County, population 29,666, has four delegates—at least until Jan. 1, 1966, under temporary reapportionment of the House of Delegates.

The table below speaks for itself.

TABLE 1. PRESENT REPRESENTATION IN MARYLAND LEGISLATURE ON BASIS OF 1960, U.S. CENSUS INCLUDING TEMPORARY REAPPORTIONMENT OF HOUSE OF DELEGATES

County	1960 Population	State Representation		No. of Persons Represented By Each	
		Senators	Delegates	Senators	Delegates
Allegany	84,169	1	6	84,169	14,028
Anne Arundel	206,634	1	7	206,634	34,439
Baltimore	492,428	1	13	492,428	82,071
Calvert	15,826	1	2	15,826	7,913
Caroline	19,462	1	2	19,462	9,731
Carroll	52,785	1	4	52,785	13,196
Cecil	48,408	1	3	48,408	16,136
Charles.	32,572	1	2	32,572	16,286
Dorchester	29,666	1	4	29,666	7,416
Frederick	71,930	1	6	71,930	11,989
Garrett	20,420	1	3	20,420	6,806
Harford	76,722	1	4	76,722	19,181
Howard	36,152	1	2	36,152	18,076
Kent	15,481	1	2	15,481	7,741
Montgomery	340,928	1	10	340,928	56,821
Prince George's	357,395	1	10	357,395	59,566
Queen Anne's	16,569	1	2	16,569	8,285
St. Mary's	38,915	1	2	38,915	19,458
Somerset	19,623	1	3	19,623	6,541
Talbot	21,578	1	3	21,578	7,193
Washington	91,219	1	6	91,219	15,203
Wicomico	49,050	1	4	49,050	12,263
Worcester	23,733	1	3	23,733	7,911
CITY					
Baltimore	939,024	6	39	156,504	26,084
TOTALS	3,100,689	29	142		
STATE AVERAGE				106,920	25,209

Proportionately, no other political subdivision in the state has experienced the population growth of Montgomery County. By comparison, some of its sister jurisdictions in the state have enjoyed stable populations, far smaller than Montgomery's, but with iden-

tical representation. Allegany County with just over 84,000 people, has lost population since the 1950 census, while retaining the same voting authority in the Senate as Montgomery. In fact, until the temporary reapportioning of the House in 1962, Allegany County also had the same number of six delegates as Montgomery, and unless the temporary reapportionment is made permanent, the two counties will continue equal in House representation.

Montgomery County and Prince George's County, which together surround the District of Columbia east of the Potomac River, have a total population of more than 835,000. In fact, Prince George's County's population of 435,000 is greater than that of four States. *Wash. Post,* Aug. 1, 1963, p. B-1.

The vast change in the size and character of its population has brought the usually expected problems to Montgomery County: roads, schools, transportation, recreation areas, public services of every kind, housing, zoning, planning, preservation of natural resources, taxes, industrial development. The smaller-populated, largely agricultural counties have these problems in far lesser degree than the populous, complex, larger counties. The so-called smaller counties control the conduct of the General Assembly and will continue to control in the Senate.

The political protectivism forever granted state subdivisions with small populations in the Maryland Senate by reason of Section 2 of Article III, Maryland Constitution, presently will grant equally discriminatory favoritism to Baltimore City.

As outlined in detail in appellants' brief, Baltimore City is on a population basis represented by six state

senators. From 1930 to 1950 the population of Baltimore City increased from 804,874 to 949,708. From 1950 to 1960, Baltimore's population *decreased* to 939,024, and such decline is predicted to continue. *Md. Population*, Md. Planning Dept., April, 1961, State Pub. No. 113.

From 1930 to 1950, the population of Montgomery County increased from 49,206 to 164,401. From 1950 to 1960 the County population increased by 176,527 to 340,928. *Md. Population, supra.* As of August 1, 1963, the estimated population is 400,000, increasing at a rate of 20,000-plus persons per year.

The trends are confidently predictable and the rate of increase of Baltimore County with 1960 population of 492,428 and Prince George's County, 357,395, are such that by the year 2000, or sooner, each of these counties, with Montgomery, will exceed Baltimore City in population.[1] Anne Arundel County (206,634) will not be far behind.

Each of these urban counties is presently condemned to immutable discrimination by the Maryland Constitution and the decision of the Court of Appeals upholding present Senate apportionment. Baltimore City with its six senators has, or shortly will have, as great a vested interest in continuing the present representation in the Senate as the less populous counties. The Senate will stand with four senators from the four

[1] Baltimore County population forecasts are a minimum of 750,000 and a maximum of 850,000 by 1980. Office of Planning and Zoning, Baltimore County. Prince George's County population is estimated as 671,995 in 1980 and 1,460,404 in 2000 by the Maryland-National Capital Park and Planning Commission; however, as this brief was written, the Commission was in process of revising its estimates.

largest counties with a majority of the state population against the interests of twenty-five senators from the rest of the state.

Constitutional representation under the 14th Amendment requires that the majority of the Senators speak for the majority of the citizens of the state. In the Senate of Maryland geography alone cannot be enough to satisfy the mandate of the 14th Amendment. There can be no sanctity in the theory of geographic apportionment within the states, since the application of the 14th Amendment is directly to the states. No Constitutional formula is expressed as to how the states shall apportion their legislatures, except as the 14th Amendment dictates equal protection of the laws. Government is of, by, and for the people; it is not for mountains, sand, earth, or sea. Trees, valleys, and rivers are not governed, nor do they govern. The people must be the concern of government, and the greatest number of them must me given a proportionate share in the deliberations of their representative legislature. The malapportionment of the General Assembly effectively nullifies the democratic rights of the people of Montgomery County.

The majority opinion of the Maryland Court of Appeals finds that the counties of Maryland "[i]n the diversity of their interests and their local autonomy . . . . are quite analogous to the states, in relation to the United States" and proceeds, with the aid of history, to uphold geographical Senate apportionment in Maryland. 229 Md. 406, 184 A. 2d 715 (1962), *supra*. The court's adoption of the federal analogy is fallacious; counties possess no sovereignty, but are mere convenience creations of the state, for the specific purpose

to exercise, within a limited sphere, the powers of the state. *Town Com'rs of Centreville* v. *County Com'rs of Queen Anne's County*, 199 Md. 652, 87 A. 2d 599 (1952); *Darling* v. *City of Baltimore*, 51 Md. 1 (1879). The state may limit the powers of a municipal corporation (such as Montgomery County), as it sees fit, *Joseph R. Foard Co.* v. *State, use of Goralski*, 219 Fed. 827 (1914); *Mayor & City Council of Baltimore* v. *Baltimore Gas & Elec. Co.*, 221 Md. 94, 156 A. 2d 447 (1960), and a municipal corporation has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of the state, *Williams* v. *Mayor & City Council of Baltimore*, 289 U.S. 36 (1933). For the nature and powers of a county or municipal subdivision within Maryland, see also *Howard County Com'rs.* v. *Matthews*, 146 Md. 553, 127 Atl. 118 (1924); *Clauss* v. *Board of Education*, 181 Md. 513, 30 A. 2d 779 (1943); *Talbot County Com'rs.* v. *Queen Anne's County Com'rs.* 50 Md. 245 (1879); *Neuenschwander* v. *Washington Suburban Sanitary Comm.*, 187 Md. 67, 48 A. 2d 593 (1946); *Pumphrey* v. *City of Baltimore*, 47 Md. 145 (1877); *City of Hagerstown* v. *Sehner*, 37 Md. 180 (1872); *Jewel Tea Co.* v. *Town of Bel Air;* 172 Md. 536, 192 Atl. 417 (1937); *Rushe* v. *Town of Hyattsville*, 116 Md. 122, 81 Atl. 278 (1911); and *Ames* v. *Board of Supervisors of Elections of Montgomery County*, 195 Md. 543, 74 A. 2d 29 (1950).

Commenting on the "local antonomy" of the counties in a recent speech to the Maryland County Commissioners' Association, the assistant secretary of Marylanland's Legislative Council, R. Lee Benson, stated that Maryland's legislative local option custom is "vir-

tually destroying" the purpose of home rule charters (Montgomery & Baltimore Counties presently are the only two with charters) and added, ". . . the smallest municipality has a great deal more power of self-determination than does even the largest county." *Wash. Post,* August 24, 1963, p. C-3.

The lower court's reliance on an analogy to the federal system is difficult to accept when the real relationship of the political bodies is considered. But even if a fair comparison could be made that the relationship of a county to its state today is not significantly different from the relationship of a state to the country, nevertheless it remains that that factor in no way should be controlling.

The guarantees of the 14th Amendment glare directly toward the state. No amount of nice comparison or reasoning that Congressional apportionment works for the country and should for the state will reduce the glare that illuminates the inescapable message that the state must provide for its citizens a fair representation in the affairs of that state.

Appellants have made pointed argument with reference to judicial and other authority, and with special reference to decisions in the lower federal and state courts, to support Montgomery County's position in the instant appeal, and the County will not reiterate appellants' brief, save to say that it is clear that substantial and grave Constitutional issues are involved herein which are of paramount importance to the functioning of democratic state governments, especially that of Maryland.

When viewed as a whole, the General Assembly of Maryland still is malapportioned. The evidence, as borne out by the practical workings of the Assembly, is clear that the Maryland Senate is so grossly malapportioned as to work an obvious invidious discrimination against the people of the urban counties. Without action of this Court striking down the unconstitutional representation in Maryland, there is no possibility that three-fifths of the Senate will approve any further change in either the Senate or the House, nor will the state courts act, since the high court of Maryland has ruled Constitutional the representative formula of the Senate. The composition of the Senate will remain as now fixed without hope of change as populations grow and discrimination intensifies.

The history of Maryland's legislative action—or rather inaction—so indicates. The possibility of fair representation in the Maryland legislature as a whole exists only if this Court defines the meaning of the 14th Amendment in the affairs of representative state government.

The likelihood of voluntary action by the General Assembly, where there is required a three-fifths majority to propose a constitutional amendment to reapportion the Senate is diminishing, not advancing.

CONCLUSION

For the reasons discussed herein, Montgomery County respectfully requests this Court to reverse the Court of Appeals of Maryland and to remand this case there under mandate as prayed by appellants in their brief.

Respectfully submitted,

ROBERT G. TOBIN, JR.
County Attorney

DOUGLAS H. MOORE, JR.
Deputy County Attorney

RICHARD J. SINCOFF
Assistant County Attorney

County Office Building
Rockville, Maryland

Attorneys for Montgomery County, Maryland

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL., APPELLANTS

v.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, ET AL.

ON APPEAL FROM THE MARYLAND COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Maryland Court of Appeals (R. 162–191) is reported at 229 Md. 406, 184 A. 2d 715. A prior opinion of the Maryland Court of Appeals is reported at 228 Md. 412, 180 A. 2d 656. The opinions of the Circuit Court for Anne Arundel County (R. 100–109, 113–122) are not reported.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on July 23, 1962 (R. 124, 163). The notice of appeal to this Court was filed on September 28, 1962, and probable jurisdiction was noted on June 10, 1963 (R. 193–197). The jurisdiction of this Court rests upon 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the apportionment of seats in the Maryland Senate on the basis of one senator for each county and each of six legislative districts in the City of Baltimore, which grossly discriminates in *per capita* representation against voters in populous counties and in favor of voters in the populous City of Baltimore as well as the rural counties, is so arbitrary and capricious as to violate the equal protection clause of the Fourteenth Amendment.

2. Whether the discrimination against voters in populous counties in *per capita* representation in the Maryland Senate, that results from allocating each county one senator regardless of population, taken in conjunction with the lack of equal representation in the House of Delegates, is so gross in relation to any permissible objective of legislative apportionment as to constitute a denial of equal protection of the laws.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Sections 1, 2, and 5 of Article III of the 1867 Maryland Constitution are set forth in Appendix A, p. 91, below. Section 42 of Article 40, Maryland Code (1962 Supp.), is set forth in Appendix A, pp. 92–96 below.

INTEREST OF THE UNITED STATES

In *Baker* v. *Carr*, 369 U.S. 186, the United States appeared as *amicus curiae* to argue that the federal courts have power to consider whether the apportionment of State legislatures violates the Fourteenth Amendment. The Court held that the federal courts have this power. This case, along with *Reynolds* v.

Sims, Nos. 23, 27, 41, *Davis* v. *Mann*, No. 69, and *WMCA, Inc.* v. *Simon*, No. 20, touches the basic substantive issue left undecided in *Baker* v. *Carr*—whether, and to what extent, the Fourteenth Amendment prohibits malapportionment of State legislatures.

These cases involve the most important right in a democracy, the right to fair representation in one's own government. In each of the four States the legislature is apportioned so as to discriminate egregiously in favor of some voters at the expense of others. This discrimination, principally against urban voters, has at least two consequences. *First*, they are deprived of their fundamental right to share fairly in choosing their own government. *Second*, the extreme underrepresentation of urban voters has resulted in discrimination by the State legislatures against urban areas in the States' exercise of governmental powers. More particularly, the underrepresentation of urban voters has been a dominant factor in the widespread failure of the States to meet growing urban problems. Thus, these cases involve both the constitutional rights and the general welfare of millions of American citizens.

STATEMENT

1. *The Complaint.* On August 12, 1960, the plaintiffs-appellants—six residents and voters of Baltimore City and three urban counties of Maryland, and an unincorporated association on behalf of its members—filed a complaint in the Circuit Court of Anne Arundel County challenging the apportionment of the Maryland legislature (R. 1–50). The defendants, who

were sued in their representative capacities as officials charged with duties in connection with State elections, include the Governor; the Maryland Board of State Canvassers, consisting of the Attorney General, Secretary of State, Comptroller of the Treasury, Treasurer, and Clerk of the Maryland Court of Appeals; and the Board of Election Supervisors of Anne Arundel County and its three members (R. 2–3).

The plaintiffs alleged that the apportionment of both houses of the Maryland legislature, pursuant to Article III, §§ 2 and 5 of the Maryland Constitution (see Appendix A, p. 91 below), seriously discriminated against inhabitants of Baltimore City and the urban counties in which they resided by giving these voters substantially less representation than an equal number of persons residing elsewhere in the State (R. 8–11). They claimed that this malapportionment violated Section 1 of the Fourteenth Amendment since that section prohibits any State from "denying, diluting or restricting the equality of voting rights or privileges among classes of otherwise eligible voters similarly situated" (R. 8). Furthermore, they alleged, the discrimination against the plaintiffs and other eligible voters in Baltimore City and four urban counties violated the equal protection clause of the Fourteenth Amendment, the Federal Civil Rights statutes (28 U.S.C. 1343 and 42 U.S.C. 1983), and Article 7 of the Maryland Declaration of Rights (R. 9–11).

Plaintiffs sought a declaratory judgment that Article III, §§ 2 and 5 violates the Fourteenth Amend-

ment and the Civil Rights statutes, 28 U.S.C. 1343 and 42 U.S.C. 1983; that the failure of the General Assembly to reapportion its membership in accordance with a formula which would reasonably reflect the present population of Baltimore City and the 23 counties of Maryland violates the Fourteenth Amendment, the federal Civil Rights statutes, and Article 7 of the Maryland Declaration of Rights; and that the failure of the General Assembly to convene a constitutional convention as approved in the general election of 1950 violates Article XIV of the Maryland Constitution and Articles 1, 7, and 45 of the Maryland Declaration of Rights (R. 18–19). Plaintiffs also asked that, unless the November 1962 election and elections thereafter were conducted on an at-large basis, the court enjoin the defendants from performing certain election duties (*i.e.*, issuing commissions to candidates, certifying the election of candidates, etc.) until such time as the General Assembly should submit for a referendum vote by the eligible State voters an amendment to Article III, §§ 2 and 5, which would reapportion the membership of the General Assembly on the basis of population in conformity with the Fourteenth Amendment (R. 19–20). Plaintiffs also requested the court to retain jurisdiction over the cause until such time as the General Assembly should submit to the voters such a constitutional amendment (R. 20).

2. *The Pre-hearing Proceedings in the State Courts.* Circuit Judge O. Bowie Duckett, sitting as Chancellor, initially sustained demurrers and dismissed the complaint without leave to amend (R. 53).

The Court of Appeals of Maryland reversed the order of the Circuit Court and remanded for a hearing on the merits (R. 54–86, 87). *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 180 A. 2d 656. The court held that the complaint alleged a justiciable cause of action; that there was a "strong implication" in *Baker* v. *Carr,* 369 U.S. 186, "that there must be some reasonable relationship of population, or eligible voters, to representation in the General Assembly, if an apportionment is to escape the label of constitutionally-prohibited invidious discrimination"; that an "inquiry into the rational basis for [the] apportionment [of the Maryland General Assembly] seems to be called for"; and that the chancellor, on remand, should determine "whether or not an invidious discrimination does exist with respect to representation in either or both houses" (R. 64–66, 70–73).

3. *The Evidence on Remand.* The Constitution of Maryland (see Appendix A, p. 91 below) vests legislative power in a bicameral General Assembly consisting of a Senate and a House of Delegates. Art. III, § 1. As to the apportionment of the Senate, Article III, § 2, provides:

> The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the quali-

> fied voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election.

Article III, § 5, provides concerning the apportionment of the lower house: [1]

> The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Harford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.[2]

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[1] This section was held unconstitutional by the Maryland courts during the present litigation, and has been superseded by temporary legislation (40 Maryland Code (1962 Supp.) § 42) which is discussed below, pp. 11–14.

[2] The Constitution of 1867, Article III, § 4, provided for a minimum of two delegates per county, with increases up to a total of six based on population up to 55,000 people, but it made no provision for additional delegates after a county reached 55,000. In 1950, Article III, § 5 was adopted as a constitutional amendment freezing the representation in the House of Delegates on the basis of the apportionment under the federal census of 1940 (R. 32–33). Article III, § 4 of the Maryland Constitution, as amended, provides for altering the boundaries of the legislative districts of Baltimore City to provide approximately equal population in the districts.

The Constitution contains no provisions for reapportionment of the General Assembly. Thus, at the time the complaint was filed, the Senate consisted of 29 senators—one from each of the State's 23 counties and one from each of the six districts of Baltimore—and the House of Delegates consisted of 123 delegates apportioned according to Article III, § 5.

At the hearing, the evidence (and computations therefrom) showed that, while Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's had an aggregate 1960 population of 2,336,409, or 75.3 percent of the total 1960 State population of 3,100,689, they were represented by only 10 senators, or 34.5 percent of the members of the Senate. On the other hand, the remaining 19 counties, with an aggregate population of 764,280, or 24.7 percent of the total State population in 1960, were represented by 19 senators, or 65.5 percent of the members of the Senate. (R. 97, 184–185.) The 15 least populous counties, with an aggregate 1960 population of 440,240, or 14.1 percent of the total State population, had 15 of the 29 senators, *i.e.*, control of the Senate (R. 27,[3] 97). The following table shows the extent of the disparities as among the pop-

[3] The correct population figures for 1960 are at R. 97, not R. 27. The most convenient tables are attached to the dissenting opinion at R. 185–186.

ulous counties, the City of Baltimore and an illustrative sampling of overrepresented counties.

County (or Baltimore City)	Total population (1960)	Number of senators	Population per senator	Ratio to most underrepresented county
Baltimore	492,428	1	492,428	1.00
Prince George's	357,395	1	357,395	1.37
Montgomery	340,928	1	340,928	1.44
Anne Arundel	206,634	1	206,634	2.38
Baltimore City	939,024	6	156,506	3.14
Washington	91,219	1	91,219	5.39
Cecil	48,408	1	48,408	10.17
Charles	32,572	1	32,572	15.11
Somerset	19,623	1	19,623	25.09
Kent	15,481	1	15,481	31.81
State total	3,100,689	29	106,920	4.61

The evidence also showed such disparities in *per capita* representation in the House of Delegates that, at the time the complaint was filed, Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's, with 75.3 percent of the total population of the State in 1960, elected only 60 delegates, or 48.7 percent of the House of Delegates; the remaining 19 counties, with 24.7 percent of the total population, had 63 delegates, or 51.3 percent (R. 27, 97). Since the apportionment of the House was modified slightly by a statute passed after the constitutional apportionment was held unconstitutional, we omit further details.

As to plaintiffs' allegation that no adequate nonjudicial relief was available to them, the defendants admitted that between 1951 and 1959 ten reapportionment bills were introduced into the General Assembly, but that all failed to pass because of opposition

of legislators from the less populous counties; and that, in 1960, neither house of the General Assembly passed bills incorporating reapportionment recommendations of a special Commission, which was created by the Governor in 1959 to investigate and report on the question (R. 11–12, 28–45, 93). The plaintiffs supported their claim that relief through constitutional amendment would be "futile" (R. 5–6, 12–13) by showing that Article XIV, § 1, of the Maryland Constitution requires a 3/5 affirmative vote of the membership of each house of the General Assembly in order to submit constitutional amendments to the voters and that the "less populous counties" control each house of the General Assembly. As to Article XIV, § 2, and Article XVII, § 9, of the Maryland Constitution, which provide for taking, at a general election each twenty years, "the sense of the People in regard to calling a Convention for altering this Constitution," the defendants admitted plaintiffs' allegations that a state-wide referendum on whether a constitutional convention should be called was submitted to the voters at the general election in 1950; that a majority of the voters (by vote of 200,439 to 56,998) approved the calling of a constitutional convention; and that ten bills providing for the convocation of a constitutional convention were introduced in the General Assembly between 1951 and 1958 and that the General Assembly refused to enact the necessary enabling legislation (R. 14, 48–49, 93–94).

4. *Decision of the Circuit Court for Anne Arundel County on Remand.* On May 24, 1962, Circuit Judge Duckett ruled that the apportionment of the House of Delegates invidiously discriminated against the people of Montgomery, Baltimore, and Prince George's Counties, but not against the people of Baltimore City or Anne Arundel County (R. 108); and that therefore Article III, § 5 of the Maryland Constitution, which apportions the House of Delegates, violates the equal protection clause of the Fourteenth Amendment (R. 108–110). Judge Duckett said that the apportionment of the Senate might be "constitutionally based upon area and geographical location regardless of population or eligible voters" (R. 107), but refrained from making a formal ruling.

Judge Duckett also stated that the General Assembly had the power to enact a statute providing for the reapportionment of the House of Delegates and to propose a constitutional amendment providing for reapportionment (R. 109). He retained jurisdiction in order to grant injunctive relief before the November 1962 election if it became appropriate (R. 109).

5. *The 1962 Legislation Apportioning the House of Delegates.* On May 31, 1962, the Maryland legislature enacted temporary legislation reapportioning the House of Delegates. Article 40 Maryland Code (1962 Supp.) § 42, Appendix A, pp. 92–96 below. The statute provides that the House of Delegates shall consist of 123 members, with each county and each of the

six legislative districts in Baltimore City receiving a minimum of two delegates. The remaining 65 delegates are to be apportioned by gubernatorial proclamation after each federal decennial census among the counties and legislative districts of Baltimore according to the following formula: The total population of the State shall first be divided by 65, with the quotient obtained constituting the unit of population necessary for an additional delegate. The quotient is then to be divided into the population of each county or legislative district having a population in excess of the unit of population, with each county and legislative district to receive an additional number of delegates equal to the resulting quotient, dropping any fractional remainder. If the total number of delegates is less than 123, additional delegates shall be apportioned among the counties and legislative districts having the highest fractional remainders until 123 delegates have been apportioned.

The new law also provides, however, that during the four-year term of the House of Delegates elected in November 1962, "and for any additional period during which this section may be extended," each county and legislative district should be entitled, as a minimum, to the same number of delegates as on January 1, 1962 (40 Maryland Code (1962 Supp.) § 42(e). In practice, this will mean that there will be more than 123 delegates and that the counties and legislative districts which were overrepresented under the old law will retain much of their former relative power. Indeed, the only effect of the new formulas as applied by the legislature in the statute

(thereby removing the need for a gubernatorial proclamation based upon the 1960 census) was to add seven delegates for Baltimore County, four delegates each for Prince George's and Montgomery, two for the Third District in the City of Baltimore, and one each for Anne Arundel and Baltimore's Fifth District.

Under the new legislation, Baltimore City and the Counties of Anne Arundel, Baltimore, Montgomery and Prince George's, with 75.3 percent of the State's 1960 population, elect 79 delegates or 55.6 percent of the House. This is only 6.9 percent more than the representation of Baltimore City and these counties prior to the statute. The remaining counties, with 24.7 percent of the State's population elect 44.4 percent of the House of Delegates. Counties with 35.6 percent of the population elect a majority of the House. (R. 184–185.) The following table shows the extent of the disparities as among the populous counties, the City of Baltimore, and an illustrative sampling of overpopulated counties.[4]

County (or Baltimore City)	Total population (1960)	Number of Delegates	Population per Delegate	Ratio to most under-represented county
Baltimore	492,428	13	37,879	1.60
Prince George's	357,395	10	35,740	1.05
Montgomery	340,928	10	34,093	1.11
Anne Arundel	206,634	7	29,519	1.28
Baltimore City	939,024	39	24,077	1.57
Charles	32,572	2	16,286	2.32
Cecil	48,408	3	16,136	2.34
Washington	91,219	6	15,203	2.49
Kent	15,481	2	7,741	4.80
Somerset	19,023	3	6,341	5.79
State total	3,100,699	142	21,837	1.73

[4] For sources, see p. 8, note 3 above.

The ideal or perfect representation per delegate is 21,831. Nineteen political subdivisions are below this figure while the remaining five subdivisions, all heavily urbanized, are above.

The new apportionment statute expires automatically on January 1, 1966, except that, if a constitutional amendment superseding the statute is submitted to the voters at the 1964 general election and rejected, the statute will continue in force until January 1, 1970. The statute further provides that upon its expiration the House of Delegates shall again be apportioned according to Article III, § 5 of the Constitution, which the Circuit Court has held unconstitutional.

6. *The Supplementary Decision by the Circuit Court for Anne Arundel County.* On June 28, 1962,[5] Judge Duckett held that the apportionment of the Maryland Senate under Article III, § 2 of the Maryland Constitution, did not violate the Fourteenth Amendment because an apportionment based upon area and geographical location regardless of population protected minorities, prevented hasty, although temporarily popular, legislation, and accorded with history, tradition, and reason (R. 107, 118–121). Judge Duckett placed considerable reliance upon a comparison to the United States Senate.[6]

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[5] Following Judge Duckett's failure to rule upon the validity of the apportionment of the Senate, plaintiffs appealed and the Court of Appeals remanded for a prompt decision (R. 112).

[6] Judge Duckett stated that the plaintiffs conceded that reapportionment of the House of Delegates was proper (R.

7. The Decision of the Court of Appeals of Maryland. The Court of Appeals, by vote of 5 to 3, affirmed the decree *per curiam*, noting that it would file an opinion at a later date (R. 124). Plaintiff's motion for re-argument, which called the court's attention to recent cases and developments in the field of legislative reapportionment (R. 125–162), was denied on September 11, 1962 (R. 125).

On September 25, 1962, the court filed its opinion (R. 162–191). The court said that the appeal did not question the apportionment of the House of Delegates (R. 164). It upheld the constitutionality of the Senate apportionment upon three distinct grounds: First, the court noted that each county has since 1837 had the same number of senators except that Baltimore City has had additional representation and that Maryland counties have always possessed and maintained "distinct individualities" (R. 166). Second, the court said, one house must be apportioned on the basis of geography because the idea of a bicameral legislature assumes two different methods of apportionment in the two houses in order to check "hasty and ill-conceived legislation" (R. 167–168). Third, the court relied on the analogy of geographic representation of the Maryland Senate to the geographic representation of the States in the federal Senate on the ground that the effect upon vot-

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114). However, while plaintiffs do not challenge the apportionment of the House as such, they do emphasize the deviations from equality in that House in challenging the apportionment of the legislature generally and the Senate in particular as discriminating against urban areas. See Brief for the Appellants, No. 29, this Term, pp. 3, 59–60.

ing rights was the same whether the voter voted for a United States Senator or a State Senator (R. 168–169).

Chief Judge Brune, Judge Prescott and Judge Marbury dissented. They pointed out that the House of Delegates, even under the new statute, was not apportioned in accordance with population, and that there were gross disparities in the Senate. After distinguishing the so-called "Federal analogy" and observing that there could be no hard and fast rule, they concluded that neither history nor "the magic phrase 'Federal analogy,'" nor the desirability of "a proper diffusion of political restraint," furnished a rational basis for such gross disparities in *per capita* representation as were found in the Maryland legislature (R. 183).

SUMMARY OF ARGUMENT

I

The equal protection clause of the Fourteenth Amendment guarantees qualified electors against arbitrary and unreasonable discrimination in the apportionment of seats in a State legislature. It is settled law that arbitrary discrimination among voters with respect to opportunities for participation in elections and other processes of government violates the Fourteenth Amendment. *Nixon* v. *Condon*, 286 U.S. 73; *Gray* v. *Sanders*, 372 U.S. 368; cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. The prevailing opinions in *Baker* v. *Carr*, 369 U.S. 186, 204–208, 226, 247–250, 251–262, 265–266, implicitly or explicitly recognize that the same principles are applicable to leg-

islative apportionment. That has been the view of the lower courts since *Baker* v. *Carr*.

Familiar principles of constitutional adjudication under the equal protection clause provide judicially manageable standards for its application to controversies over legislative apportionment. The basic standard of comparison is the representation accorded qualified voters *per capita*. Whether there are other permissible objectives of legislative apportionment that would justify substantial deviation from *per capita* equality need not be decided in this case nor in the companion cases from Alabama, Virginia and New York. We assume *arguendo*, without prejudice to future cases, that there may be objectives of legislative apportionment that would justify inequalities, but the justification must be strong enough to make the discrimination reasonable in the light of the basic ideal of political equality. "The creation by law of favored groups of citizens and the grant to them of favored political rights is the worst of all discriminations under a democratic system of government" (Justices Black and Douglas dissenting in *South* v. *Peters*, 339 U.S. 276, 279).

Plainly, an apportionment that creates gross inequalities in *per capita* representation without rhyme or reason is arbitrary and capricious discrimination, which violates the Fourteenth Amendment. "* * * it has been open to courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Baker* v. *Carr*, 369 U.S. 186, 226.

Equally plainly, the equal protection clause is violated by a discriminatory apportionment based upon criteria that are contrary to express constitutional limitations or otherwise invidious or irrelevant. An apportionment based upon race or sex would be invalid, also one based upon an invidious criterion, such as religion or national origin, or a whimsical standard, such as the first letter of each county's name or its geographical location. An apportionment serving no purpose other than that of giving bankers, farmers, trade union members or any other class or profession greater or less weight in the legislature than its numbers warrant would also violate the Fourteenth Amendment. While an apportionment which serves permissible objectives may be valid even though it happens also to favor, within limits, the voters in rural areas, it is nevertheless invalid if it serves no purpose except strengthening the rural vote. The creation of a favored class of voters with political power disproportionate to their number is not a permissible objective of legislative apportionment.

Whether there are constitutionally adequate reasons for the differences in the representation in different cities or counties, measured *per capita,* depends not only upon the character of the justification but also upon the degree of the differentiation. We are dealing with a fundamental political right expressly recognized by the founding fathers, that goes to the heart of American government. When a State deals with such a right, the equal protection clause applies

more strictly than when the subject is economic regulation. Whatever may be true in other cases, the equal protection clause is violated by an apportionment that subordinates the principle of popular representation to the representation of political subdivisions to such a degree as to create gross inequalities in the representation of voters in both houses of a State legislature and to give control of both houses to representatives elected by small minorities of the people. Whether it requires more can be left to the future.

II

Applying the foregoing principles, we submit that the present apportionment of seats in the Maryland legislature violates the Fourteenth Amendment for two reasons.

First, the present apportionment discriminates, without rhyme or reason, against the voters in Baltimore, Prince George's and Montgomery Counties. Since every county is assigned one senator regardless of population, citizens in those three heavily populated counties have less than one-sixteenth the voting power of citizens in any of the ten least populous counties. In the instant case that gross inequality cannot be justified upon the ground that Maryland's policy is to have senators represent counties rather than people, for Baltimore City is given six seats in the State Senate with the result that a voter in Baltimore City has three times the representation of a voter in Baltimore County and more

than twice the representation of voters in Prince George's and Montgomery. Every contention that can be made for geographical diffusion of voting power, for avoidance of domination by the concentrated votes of a large city, for reserving enough votes to give every locality some representation, or for avoiding excessively large districts, cuts against favoring the voters of Baltimore City over the voters of Baltimore, Prince George's and Montgomery counties. Nor can we discover any other possible justification for discriminating against the citizens of the latter counties as compared to both the urban voters in Baltimore City and the rural voters in the sparsely populated counties. The lack of uniformity apparently results from the exercise of sheer political power based upon *no* policy.

Second, as urged by Chief Judge Brune and Judges Prescott and Marbury dissenting, the apportionment of the Maryland legislature violates the equal protection clause by subordinating popular representation to the representation of political subdivisions to such a degree as to create gross inequalities among voters and give control of both houses of the legislature to representatives elected by small minorities of the people. The grave inequalities in *per capita* representation in the Maryland Senate are epitomized by the fact that there are eight counties in which the voters have at least twenty times the *per capita* representation of a voter in Baltimore County, fourteen times the representation of a voter in Montgomery County and fifteen times the repre-

sentation of a voter in Prince George's County. A majority of the Senate may be elected by as little as one-seventh of the people. The House of Delegates is also apportioned in a manner which results in substantial discrimination. The disparity between voters in the most overrepresented and most underrepresented counties runs as high as 6 to 1. Thirty-six percent of the people elect a majority of the House. The disparities favor the same voters in both branches.

If one house of a legislature is apportioned substantially in accordance with population, the Fourteenth Amendment may leave wider room for variation in the other. We assume that much for the purposes of the case, for the issue is not now before the Court. There can be no justification, however, for substantial discrimination against the same people in their *per capita* representation in both houses. The analogy that the court of appeals sought to draw from the United States Senate is inappropriate not only because of its different origin, but also because the federal House of Representatives is apportioned substantially in accordance with population. Nothing in Maryland's history vindicates the discrimination, for the inequalities have been growing steadily greater. Maryland's gross malapportionment finds no support in the practice of other States, nor in the objectives supposed to be advanced by apportioning representatives to political subdivisions as such. It therefore violates the equal protection clause of the Fourteenth Amendment.

ARGUMENT

INTRODUCTION

The present case challenging the apportionment of representatives in the Maryland legislature and related cases challenging the apportionment in Alabama, Virginia and New York[7] bring before the Court for the first time the question—what criteria are to be applied in implementing the decision in *Baker* v. *Carr*, 369 U.S. 186. Since the case comes here from a State court that took jurisdiction, there is no occasion to consider whether it might have declined to intervene in the exercise of equitable discretion[8] or, as a federal court might conceivably do, upon the ground that a matter involving interference with the political processes of the State, if relief is granted, should be referred first to the State's own courts.[9] Nor is there any question here concerning

[7] *Reynolds* v. *Sims*, Nos. 23, 27, and 41, this Term, *Davis* v. *Mann*, No. 69, this Term, and *WMCA, Inc.* v. *Simon*, No. 20, this Term. Although this brief contains a general discussion of the basic principles applicable to all four cases, the government also is filing a separate brief in each case discussing the application of the principles to its facts and dealing with any special problems.

[8] In a case litigated in a State court, the question of equitable discretion is a State question which is not reviewable in this Court. On the other hand, such a question in a federal court is, of course, a federal question. Such an issue is before this Court in *Wesberry* v. *Sanders*, No. 22, this Term, where the federal district court dismissed a suit challenging Congressional districting in Georgia for want of equity. See our brief in *Wesberry* v. *Sanders*, No. 22, This Term, pp. 36–42.

[9] This issue is involved in *Davis* v. *Mann*, No. 69, this Term, and will be discussed in our brief in that case.

the form of relief to be fashioned by the Maryland courts.

We lay entirely to one side all questions concerning gerrymandering. Whatever constitutional claims can be raised against drawing the boundary lines of electoral districts so as to increase the legislative power of a party or other political group or to affect the weight of voters of identifiable views in electing representatives, the claim is very different from the assertion of a right to have the same degree of representation as other citizens once the districts have been chosen.

In terms of policy, an apportionment of representation in a legislative body in a manner that gives the people of some areas greater representation *per capita* than others is an unwarranted departure from the democratic ideals of equality and majority rule. Whatever justification the origins of political institutions, the scattered character of settlements, difficulties of travel and communications and the coherence of local communities may once have afforded for other bases of representation, there is scant reason today for any substantial deviation from the principle that representation should be proportionate to population. *One Man—One Vote, A Statement of Basic Principles of Legislative Apportionment* (Twentieth Century Fund, 1962), pp. 4–5. See also Kennedy, *The Shame of the States*, N.Y. Times Magazine, May 18, 1958, pp. 12, 37; United States Commission on Intergovernmental Relations, *Report to the President* (1955), pp. 38–40; United States Advisory Commission on In-

tergovernmental Relations, *Report: Apportionment of State Legislatures* (1962), pp. 67–73; Key, *American State Politics: An Introduction* (1956), pp. 60–63, 75–76; Strout, *The Next Election is Already Rigged,* Harper's (November 1959), reprinted at 106 Cong. Rec. A 519–521; Baker, *Rural versus Urban Political Power* (1955).[10]

We are not unmindful, however, that throughout our constitutional history many States, both in adopting their fundamental constitutional charters and in practice, have chosen bases of apportionment for one house and occasionally both houses of the legislature, such as the representation of political subdivisions, which produce results varying from equality of representation *per capita.* Whether the practical operation of those provisions was formerly so different from what it is today and whether the changes in facilities of communications and transportation as well as social and economic conditions have destroyed whatever justification the variances once had, are questions that need not be decided here. The settled principle that the Court will not go farther in deciding questions of constitutional law than required by the record before it carries added wisdom in dealing with such novel and difficult problems as legislative apportionment. Each of the four apportionment cases at bar can be decided without ruling upon whether the Fourteenth Amendment always requires substantially equal rep-

[10] For a bibliography of the issues involved in this case, see *Selected Bibliography on Legislative Apportionment and Districting* (Silva and Boyd ed., National Municipal League, 1963).

resentation *per capita* in both houses of a State legislature. For even if there are permissible objectives of legislative apportionment which would justify some departure from equal representation *per capita*, the discrimination in each of these four cases must be held so arbitrary and capricious as to deny the victims equal protection of the laws. Thus, the Court can decide these cases while leaving the broader issue to a later day.

We follow the same course. Our analysis of the application of the Fourteenth Amendment to controversies over legislative apportionment sustains the constitutional claims of the complainants yet it is wholly consistent with the view that the Fourteenth Amendment leaves room for accommodating, within reasonable limits, the principle of equal representation and other permissible objectives. We assume that view throughout our briefs. Since it would be redundant to reiterate the qualification on every relevant occasion, we emphasize now that the assumption is made *arguendo*, reserving further judgment until the issues are presented.

In this brief we argue first, that the guarantees of the Fourteenth Amendment are applicable to the apportionment of representatives in a legislature—a question technically left open in *Baker* v. *Carr*—and in the course of that discussion we submit what we believe to be the controlling standards, indicating their application to all four apportionment cases before the Court to the extent necessary to present a compendious approach to the implementation of *Baker* v. *Carr*.

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The other half of our Argument deals specifically with the present case. We submit that the Maryland apportionment denies petitioners the equal protection of the law, first, because it discriminates without rhyme or reason between the people of Baltimore City, on the one hand, and the people of Baltimore, Prince George's and Montgomery Counties, on the other; second, because it grants rural counties such heavy overrepresentation in both branches of the legislature as to submerge the principles of popular representation and majority rule.

I

THE EQUAL PROTECTION CLAUSE GUARANTEES QUALIFIED VOTERS AGAINST ARBITRARY AND UNREASONABLE DISCRIMINATION IN THE APPORTIONMENT OF SEATS IN A STATE LEGISLATURE

Although *Baker* v. *Carr*, 369 U.S. 186, left open the question whether the equal protection clause imposes any substantive limitations upon the power of a State to dilute the value of the franchise of some voters as opposed to others by arbitrary and unreasonable discrimination in the apportionment of seats in a State legislature, the State and lower federal courts unanimously agree that such an apportionment violates the Fourteenth Amendment. *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Lisco* v. *McNichols*, 208 F. Supp. 471 (D. Colo.); *Sobel* v. *Adams*, 208 F. Supp. 316, supplemental opinions, 208 F. Supp. 319, 214 F. Supp.

811 (S.D. Fla.); *Thigpen* v. *Meyers,* 211 F. Supp. 826 (W.D. Wash.), pending on appeal, No. 381, this Term; *Toombs* v. *Fortson,* 205 F. Supp. 248, 254, and unreported opinion, September 5, 1962 (N.D. Ga.); *WMCA, Inc.* v. *Simon,* 208 F. Supp. 368 (S.D.N.Y.), pending on appeal, No. 20, this Term; *Moss* v. *Burkhart,* 207 F. Supp. 885, and unreported opinion, July 17, 1963 (W.D. Okla.); *Mann* v. *Davis,* 213 F. Supp. 577 (E.D. Va.), pending on appeal, No. 69, this Term; *Wisconsin* v. *Zimmerman,* 209 F. Supp. 183 (W.D. Wis.); *League of Nebraska Municipalities* v. *Marsh,* 209 F. Supp. 189 (D. Neb.); *Sincock* v. *Duffy,* 215 F. Supp. 169 (D. Del.), pending on appeal, No. 307, this Term; *Davis* v. *Synhorst,* 217 F. Supp. 492 (S.D. Iowa); *Nolan* v. *Rhodes,* U.S.D.C., S.D. Ohio, decided June 12, 1963; *Caesar* v. *Williams,* 371 P. 2d 241 (Idaho Sup. Ct.), petition for rehearing denied, 371 P. 2d 255; *Maryland Committee for Fair Representation* v. *Tawes,* 228 Md. 412, 180 A. 2d 656; *Maryland Committee for Fair Representation* v. *Tawes,* Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962, supplemental opinion June 28, 1962, affirmed, 229 Md. 406, 184 A. 2d 715, pending on appeal, No. 29, this Term; *Scholle* v. *Secretary of State,* 367 Mich. 176, 116 N.W. 2d 350 (opinions of Justices Kavanagh and Souris), pending an appeal *sub nom. Beadle* v. *Scholle,* No. 24, this Term; *Levitt* v. *Maynard,* 104 N.H. 243, 182 A. 2d 897; *Sweeney* v. *Notte,* 183 A. 2d 296 (R.I. Sup. Ct.); *Harris* v. *Shanahan,* District Court, Shawnee County, Kansas, opinions of May 31, 1962, and July 26, 1962; *Fortner* v. *Barnett,* No. 59,965, Chancery Court, First Judicial District of Hinds County, Mississippi; *Fishman*

v. *White*, Superior Court, Suffolk County, Massachusetts, decided March 27, 1963; *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642. See also *Asbury Park Press, Inc.* v. *Woolley*, 33 N.J. 1, 161 A. 2d 705, 710.

We submit that this widespread acceptance of the view that the Fourteenth Amendment has substantive content as applied to legislative apportionment is plainly correct.

A. THE FOURTEENTH AMENDMENT SECURES EQUALITY OF OPPORTUNITY UNDER LAW FOR PARTICIPATION IN THE PROCESS OF SELF-GOVERNMENT

It has long been settled law that arbitrary discrimination among voters with respect to participation in primary elections or other governmental processes violates the equal protection clause. *E.g.*, *Nixon* v. *Condon*, 286 U.S. 73; *Nixon* v. *Herndon*, 273 U.S. 536; cf. *Gomillion* v. *Lightfoot*, 364 U.S. 339. *Gray* v. *Sanders*, 372 U.S. 368, squarely holds that there is a constitutional right to freedom from inequality in the weighting of votes as well as in the opportunity to cast ballots. There is no relevant difference, from the standpoint of the fundamental right at stake, between undue discrimination diluting a qualified voter's influence in election of a governor and undue discrimination diluting his influence in the legislature of a representative government, even though the standards of "undue" differentiation may be quite different because different considerations are relevant in apportioning representatives than in counting votes within a single constituency.

The opinion of the Court in *Baker* v. *Carr* and the dissenting opinion of Mr. Justice Frankfurter both

assume that some kinds of discrimination in an apportionment may be so invidious or unjust as to violate the Fourteenth Amendment. See 369 U.S. at 226 and 300. The concurring opinion of Mr. Justice Clark rests upon that proposition. *Id.* at 251. Mr. Justice Douglas also concluded that if the plaintiffs proved their allegations there was a violation of the Fourteenth Amendment. *Id.* at 245. Once the point is acknowledged, the only remaining question is what standards shall apply in adjudicating claims of unconstitutional discrimination.

B. FAMILIAR PRINCIPLES OF CONSTITUTIONAL ADJUDICATION UNDER THE EQUAL PROTECTION CLAUSE PROVIDE JUDICIALLY MANAGEABLE STANDARDS FOR ITS APPLICATION TO CONTROVERSIES OVER LEGISLATIVE APPORTIONMENT

1. The basic standard of comparison is the representation accorded qualified voters per capita

The starting point in adjudicating the constitutionality of an apportionment of representatives in a State legislature when attacked under the equal protection clause should be *per capita* equality of representation.[11] This standard of comparison is required

[11] "*Per capita* equality of representation" in our view may be measured either by voters or total population. In a few areas the number of aliens may be large enough to be significant, but that is seldom true. Furthermore, neither choice could be condemned as arbitrary or capricious.

By equality we mean only substantial equality disregarding those variations that the practicalities of any apportionment and of the electoral process make inevitable. See *Ragland* v. *Anderson*, 125 Ky. 141, 158, 100 S.W. 865, 869, where the court spoke of "that equality in the representation of the State which an ordinary knowledge of the population and a sense of common justice would suggest."

by fundamental ideals of American political life—the principles of equality and majority rule. "The conception of political equality from the Declaration of Independence to Lincoln's Gettysburg Address to the Fifteenth, Seventeenth and Nineteenth Amendments can mean only one thing—one person, one vote." *Gray* v. *Sanders*, 372 U.S. 368, 381. Jefferson, Madison and other founding fathers firmly believed that fundamental fairness required that both houses of State legislatures be apportioned solely on the basis of population, as shown by their speeches at the constitutional and the ratifying conventions, as well as by their other writings. See pp. 61–64 below. The extent to which this right of equal representation is ingrained in our constitutional system is evidenced by the fact that even before *Baker* v. *Carr*,[12] all but four of the State constitutions (or statutes in States with no apportionment provisions in their constitutions) made apportionment according to population or voters as the sole, or at least an important, principle for choosing at least one branch of the State legislature.[13] Eleven States provided for apportionment in both houses entirely in proportion to population or voters.[14] Another nine appor-

[12] The figures in this paragraph are based on State constitutions and statutes as they were published in the various State codes as of September 1961. Changes in these provisions subsequent to *Baker* v. *Carr* reflect in large part court orders or the threat of court orders.

[13] The exceptions were Delaware, Maryland, Mississippi and Virginia.

[14] Colorado, Indiana, Massachusetts, Minnesota, Nebraska (unicameral), Oregon, South Dakota, Tennessee, Washington, West Virginia and Wisconsin.

tioned one house in this manner and in the other based the apportionment upon population, except that each county or town was guaranteed at least one seat or there was some other such limitation.[15] Three apportioned one house by population although population was not recognized in apportioning the other house.[16] Eleven States provided for the apportionment of both houses on the basis of a standard including population but placed some limitation on this principle in both houses.[17] And twelve States, although they provided other bases for choosing representatives in one branch, called for apportionment of the other according to population with the stipulation that each county or town should have at least one seat or with some other limitation.[18] In evaluating the limitations it must also be kept in mind that the guarantees of one representative to each county or town would not formerly have created inequities in *per capita* representation of the same order of magnitude as they often create today. See, *e.g.*, pp. 82–83 below; I David and Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-term Trends in State Legislative Representation* (University of Virginia, 1961), p. 9.

The principle is also reflected in the decisions of

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[15] Alaska, Kansas, Kentucky, Missouri, Montana, North Carolina, Ohio, Oklahoma and Utah.

[16] California, New Hampshire and Illinois.

[17] Alabama, Connecticut, Florida, Iowa, Maine, New Mexico, New York, Pennsylvania, Rhode Island, Texas and Wyoming.

[18] Arizona, Arkansas, Georgia, Hawaii, Idaho, Louisiana, Michigan, Nevada, New Jersey, North Dakota, South Carolina and Vermont.

this Court. In *Gray* v. *Sanders*, the Court said (372 U.S. 368, 379–380):

> Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment. The concept of "we the people" under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications. The idea that every voter is equal to every other voter in his State, when he casts his ballot in favor of one of several competing candidates, underlies many of our decisions.

The decision emphasizes the degree to which equality of right in participation in representative government is a fundamental principle of the political philosophy embodied in American institutions and safeguarded by the Fourteenth Amendment.

The right to equal treatment in choosing a legislature cannot be less than the right in the choice of a governor. This is not to say that the issues here and in *Gray* v. *Sanders* are the same.[19] The law is concerned with the adjustment of conflicting rights, and there may be matters of legitimate concern in the apportionment of representatives which are not involved in giving effect to the votes within

[19] The distinction was emphasized in the opinion of the Court (372 U.S. at 378) and the concurring opinion of Mr. Justice Stewart (joined by Mr. Justice Clark) (*id.* at 381–382).

a single constituency. Nevertheless, the "creation by law of favored groups of citizens and the grant to them of preferred political rights is the worst of all discriminations under a democratic system of government." *South* v. *Peters*, 339 U.S. 276, 279 (Justices Black and Douglas dissenting). Once it appears that persons similarly circumstanced have been denied equality of representation *per capita*, the apportionment stands condemned unless the differentiation has a relevant and substantial justification.

The usual standard for judging the constitutionality of legislative classifications is whether the differentiation is arbitrary and unreasonable. *Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78–79; *McGowan* v. *Maryland*, 366 U.S. 420, 425–426; *Phillips Chemical Co.* v. *Dumas School District*, 361 U.S. 376, 385; *Morey* v. *Doud*, 354 U.S. 457, 463–464. "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law." *Goesaert* v. *Cleary*, 335 U.S. 464, 466.

Whether a distinction is "reasonable" necessarily depends both upon the kind and degree of the inequality and upon the existence and importance of the justification, *i.e.*, the aims of the legislation. Greater justification is necessary to support discrimination in matters of political right than in taxation or economic regulation. See pp. 65–69 below. Furthermore, a State policy that would justify minor inequalities in representation *per capita* may be so inadequate in comparison with grosser inequalities

as to leave the discrimination arbitrary and capricious. In principle, therefore, the Court must always examine both pans of the scale and every case must be tested by the one ultimate question whether the actual discrimination against the *per capita* representation of the complaining class of voters has a rational basis in the objectives the apportionment law is designed to achieve. It seems helpful, however, to particularize some specific applications of the general test.

2. The equal protection clause is violated by an apportionment that creates gross inequalities in representation without rhyme or reason

This proposition asserts no more than that when a State discriminates in the representation accorded the voters in different districts for no reason whatsoever the discrimination violates the equal protection clause. One would suppose that such cases would be only imaginary but experience shows that gross inequalities often develop in the apportionment of a legislature without any intelligible foundation. Some stem from shifts in the distribution of population combined with the unwillingness of the controlling majority to surrender a measure of its power by reapportioning the legislature in accordance with the mandate of the State's own constitution. Other instances suggest that arbitrary and capricious discrimination sometimes results from current use of sheer political power without any logic or policy except the perpetuation of political control.

Cases in this Court offer dramatic illustrations. Mr. Justice Clark's opinion in *Baker* v. *Carr* demonstrates that Tennessee's apportionment was "a crazy

quilt without rational basis." 369 U.S. at 254. The opinion of the district court upon remand invalidated a new apportionment of the Senate upon the same reasoning. *Baker* v. *Carr,* 206 F. Supp. 341, 346–348 (M.D. Tenn.).

The preexisting apportionment in the Alabama cases now before the Court [20] affords another illustration of gross and capricious discrimination allowed to develop in plain disregard of the State's own Constitution. In the House we disregard the divergencies attributable to the State's constitutional requirement that each county have one representative; whatever its validity (see pp. 46–50 below), that is not an irrational distribution based upon *no* policy. The crazy-quilt appears in the distribution of the remaining seats. Barbour County with 12,350 people has two representatives in the lower house while Baldwin County with 49,088 has only one; in other words a vote in Barbour County counts eight times a vote in Baldwin County. In Hale County with two seats there are 19,547 people, one representative for each 9,769. In Mobile County with three seats there are 314,301 people, one representative for each 104,767. These are not a few freak situations. Applying Alabama's own Constitution, one finds that of the 30 counties with more than one seat, 15 are overrepresented and six are underrepresented; thus the vice affects 70 percent. Not only are the inequalities great,

[20] *Reynolds* v. *Sims,* Nos. 23, 27, 41. The cases involve four apportionments: the apportionment in force when the action was instituted, which we shall call the "preexisting apportionment"; the proposed constitutional amendment; the Crawford-Webb Act; and the apportionment ordered by the district court.

but they result in giving control of the House to counties having only 25.7 percent of the total population. In our separate brief in the Alabama cases we shall show the wholly capricious inequalities in the preexisting Alabama apportionment in full detail and demonstrate that they extend to the Senate. We cite them here only to illustrate the application to apportionment of the familiar constitutional principle that State action is invalid if it involves discrimination that reflects no policy, but simply arbitrary and capricious action.

The Virginia apportionment held invalid in *Davis* v. *Mann*, now pending on appeal, No. 69, this Term, was adopted in 1962 and cannot be ascribed to the passage of time and legislative indifference, but we submit that it too is either a crazy-quilt or else an instance of hostile discrimination against the people of Arlington and Fairfax Counties and the City of Norfolk. The following tables give a quick summary of the inequalities, which will be discussed at more length in our brief in *Davis* v. *Mann*:

ASSEMBLY

District	Population (1960)	Seats	Population per seat	Percent of ideal ratio
Arlington	163,401	3	54,467	73
Fairfax, et al	285,194	3	95,064	42
Norfolk City	305,872	6	50,978	73
Loudoun	24,549	1	24,549	182
Petersburg City, et al	58,023	2	29,466	135

SENATE

Arlington	163,401	1	163,401	61
Fairfax, et al	285,194	2	142,597	70
Norfolk City	305,872	2	152,936	65
Loudoun, et al	63,703	1	63,703	156
Petersburg City, et al	74,074	1	74,074	134

The only explanation offered by appellees is that large numbers of men in the armed forces live in Arlington, Fairfax and Norfolk. The district court rejected this theory as factually inadequate, and its sufficiency, either in fact or law, will doubtless be an issue in the Virginia case.

The instant case arising from Maryland is quite similar in principle, although the alleged justification has not been advanced. As we show later in more detail (pp. 50–57 below), even if Maryland were free to apportion her Senate by counties without regard to population, the present apportionment would be invalid because it results in arbitrary discrimination between the people of Prince George's, Montgomery and Baltimore Counties, on the one hand, and the rural counties and the City of Baltimore, on the other. Each of the 23 counties has one seat, but Baltimore City which is an entirely separate political subdivision is given six additional seats, one for each of six legislative districts. Thus, the voters of Baltimore City have one senator for every 156,504 people, but the voters in Baltimore County have only one for a population of 492,428; the discrimination is in the ratio of 3 to 1. There is similar discrimination in favor of Baltimore City against Prince George's and Montgomery Counties each of which has a single senator for approximately 350,000 people against the one senator for each 156,504 people in Baltimore City. The voters of the ten least populous counties have, on the average, almost fifteen times the representation *per capita* of the people of Prince George's and Mont-

gomery Counties. While representation of historical political subdivisions having an identity and significance of their own might be, within limits, a permissible basis of representation under some circumstances and may be blended with representation by population in order to temper any injustice to the people of populous areas, it is arbitrary and capricious to discriminate without rhyme or reason against the people of some populous areas in favor of both rural areas and other populous areas.

By way of contrast and limitation we should point out that several of the apportionments challenged in the pending cases cannot be classed as "crazy-quilt," whatever may be their validity or invalidity from other points of view. Alabama's proposed constitutional amendment would distribute the Senate seats one to each county, and the seats in the lower house one to each county with the remaining seats according to population. New York makes the latter allocation in the lower house. The current Maryland statute applies the same principle except that each county was guaranteed against a reduction of its former representation. In each of these instances the apportionment follows some rule.

At this juncture we refer to the facts of the specific cases before the Court only as part of our effort to show compendiously how familiar principles of constitutional law provide standards for the adjudication of controversies over legislative apportionment. The soundness of the standard here invoked—that the equal protection clause is violated by an apportionment that works gross inequalities in representation without rhyme or reason—scarcely requires argu-

ment. As the Court said in *Baker* v. *Carr*, *supra*, 369 U.S. at 226—

> it has been open to the courts since the enactment of the Fourteenth Amendment to determine, if on the particular facts they must, that a discrimination reflects *no* policy, but simply arbitrary and capricious action.

The principle has been applied in a host of lower court decisions following *Baker* v. *Carr*. *Baker* v. *Carr*, 206 F. Supp. 341, 346–348 (M.D. Tenn.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 254–255, 256 (N.D. Ga.); *Sobel* v. *Adams*, 208 F. Supp. 316, 323–324 (S.D. Fla.); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 184 (D. Del.), pending on appeal *sub nom. Roman* v. *Sincock*, No. 307, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Moss* v. *Burkhart*, U.S.D.C., W.D. Okla., decided July 17, 1963; *Sweeney* v. *Notte*, 183 A. 2d 296, 305 (R.I. Sup. Ct.) (Justice Roberts concurring); *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642; see *Wesberry* v. *Vandiver*, 206 F. Supp. 276, 282 (N.D. Ga.), pending on appeal, No. 22, this Term (involving Congressional districting).

3. The equal protection clause is violated by a discriminatory apportionment based upon criteria which are contrary to express constitutional limitations or otherwise invidious or irrelevant

Although a *prima facie* demonstration that an apportionment is a crazy-quilt is enough to condemn it under the Fourteenth Amendment (unless and until this showing is rebutted), an apportionment is not

constitutional merely because it conforms to some criterion capable of verbal articulation. To put an extreme case, the equal protection clause would condemn an apportionment that systematically, but without other reason, gave each county whose name began with a letter in the first half of the alphabet four representatives and the other counties three. "The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." *Skinner* v. *Oklahoma,* 316 U.S. 535, 542.

Gomillion v. *Lightfoot,* 364 U.S. 339, although a case involving participation in municipal government, suggests another clear example of an unconstitutional apportionment based upon a systematic rule: if a State apportioned its representatives in a manner that systematically discriminated against areas containing a large Negro population—for example, by apportioning representatives in the ratio of the white population of each county to the total number of whites—the apportionment would violate the Fourteenth and probably the Fifteenth Amendments. Discrimination based upon sex would result in few inequalities, because the distribution of women today conforms rather closely to the pattern of population, but if serious inequalities should result, that apportionment would violate the Fourteenth and perhaps the Nineteenth Amendments.

The principle is not limited to discriminations that are shown invidious by an explicit constitutional limitation. It would be just as impermissible to deny

equal representation on the basis of national origin, religion or political philosophy. Although these differentiations are logically intelligible, they are both invidious and irrelevant to any tolerable purpose of governmental organization; they violate those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." *Hebert* v. *Louisiana*, 272 U.S. 312, 316.

An apportionment serving no purpose other than that of giving bankers, farmers, trade union members or any other class or profession greater or less weight in the legislature than other citizens would also violate the guaranty of equal protection. In *Gray* v. *Sanders*, 372 U.S. 368, 379, the Court held that all who participate in an election are to have an equal vote—whatever their occupation, whatever their income, or wherever their home may be within the area for which the election is held. There is no greater reason to attribute extra virtue or grant added power to voters of a particular occupation, economic status or place of residence in the apportionment of a State legislature. A rural voter is not entitled, by reason of that fact alone, to have greater or less representation than an urban resident.

This is not to argue that *Gray* v. *Sanders* governs all aspects of controversies over inequalities in representation. One difference is that an inequality in representation may perhaps be justified (if it held within tolerable limits) by a legitimate objective of legislative apportionment that can only be satisfied by some sacrifice of the principle of *per capita*

equality. The second difference, which follows from the first, is that an apportionment which has a *bona fide* constitutional justification is not invalid *merely* because it also results, if measured by the number of people represented by each seat, in classifications more or less corresponding to economic, occupational or geographic groups.

For example, if an apportionment gave the voters in the western half of a State more representatives *per capita* in the Senate than voters in the eastern half for no discoverable reason other than that they lived nearer the setting sun, the discrimination would be condemned by the equal protection clause as based upon utterly irrelevant criteria. On the other hand, if it appeared that every county had two senators because the State's policy was to have counties represented as communities with interests and coherence of their own regardless of the number of voters in each, the coincidence between geographical location and the differences in representation *per capita* would not be enough automatically to invalidate the apportionment as arbitrary discrimination, and one would have to go on to inquire whether it was reasonable or unreasonable in the light of its history and objectives (see pp. 44–50 below). The coincidence between geography and relative density of population would make it convenient and for some purposes accurate, to say of the example that voters in the eastern part of the State were the victims of adverse classification but geography would not be the cause or basis thereof, and the apportionment would not be condemned by either of the rules thus far discussed.

WMCA, Inc. v. *Simon,* No. 20, this Term, in our view, presents an instance of discrimination in the degree of representation accorded different groups of qualified voters on the basis of utterly irrelevant, if not invidious, criteria. Although the apportionment of the New York Assembly, being based partly upon the principle of representation by political subdivisions, cannot be challenged on that ground, seats in the Senate are systematically divided in such a way that the *per capita* representation of voters living in any county with more than 6 percent of the State's population is limited by New York's apportionment formula to about 60 percent of the *per capita* representation of voters in less populous counties. We shall show in our brief in the *WMCA* case that the differentiation serves no function in New York except to preserve minority rule by arbitrarily enhancing the political power of voters living in counties which have less than 6 percent of the State's population. The creation of a politically favored class of voters with power disproportionate to their number is not a permissible objective of legislative apportionment; the discrimination, lacking in relevant objective, is arbitrary and capricious; and the provisions of the State constitution providing for such discrimination thereby deny the complainants equal protection of the laws.

Various bases of apportionment have been used, or might be suggested, that are neither invidious nor whimsical but nevertheless create inequalities among voters when measured by the principle of *per capita*

equality. New Hampshire, for example, provides for popular representation in the lower house but tempers this with an apportionment of Senate seats in the ratio of direct taxes paid. N.H. Const., Pt. 2, Art. 26th. In such cases familiar constitutional principles call for two inquiries:

(i) Is the differentiation based upon criteria relevant for the purposes of governmental organization or the electoral process? Objectives that are material in other contexts may be irrelevant for the purposes of representation. Farmers and bankers need not be taxed alike but the occupational difference is irrelevant to the problems of governmental organization. Thus, in *Skinner* v. *Oklahoma,* 316 U.S. 535, the Court held that the distinctions between larceny and embezzlement that are constitutional for the purposes of ordinary criminal law deny equal protection under legislation providing for the sterilization of habitual offenders and designed to prevent the transmission of their criminal proclivities.

(ii) Is the alleged objective one that a State may reasonably deem adequate to justify the inequalities actually resulting, taking into account the primacy of the principles of voter equality and majority rule? Whether there are constitutionally adequate reasons for the differences in the representation accorded the people of different counties, measured *per capita,* depends not only upon the character of the proferred justification but also upon the degree of the differences. Circumstances or objectives that might, under our basic assumption, furnish a reasonable basis for

small inequalities may be utterly inadequate, even whimsical, when offered as support for grosser discrimination.

In suggesting this inquiry we are not unmindful of the limits of the judicial function. The Court is not to exercise the legislative function of choosing between alternatives; still greater deference may be due the people of a State when exercising the sovereign function of shaping their own governmental institutions. The postulates of federalism also argue that in this area the national judiciary must take care to allow full scope for local self-government.

Yet we deal with fundamental political rights that go to the heart of American government. The Court has always applied the equal protection clause more strictly in dealing with political and human rights than in passing upon economic legislation. See pp. 65–69 below. In the final analysis, therefore, there is no escape from the ultimate question whether the State's objective is a constitutional justification for the inequalities it has created in its law.

It is unnecessary to canvass all the actual and potential bases for deviating from the principle of apportionment in direct ratio to the distribution of population. The principal conflicting policy asserted by the States in the cases at bar is that of granting representation by established political subdivision, an historic practice in the United States that may be claimed to assure a voice to scattered interests that would otherwise go unrepresented and also to have values of its own. In next suggesting the rule ap-

plicable to these cases, however, we illustrate what we believe to be the manner in which settled principles of constitutional law require one to analyze other apparently rational and non-invidious bases of apportionment.

4. The equal protection clause is violated by an apportionment which subordinates the principle of popular representation to the representation of political subdivisions to such a degree as to create gross inequalities in the representation of voters and give control of the legislature to small minorities of the people

Recognition of political subdivisions in the apportionment of representatives has a long history in American political institutions. The United States Senate is made up of two representatives of each of the States.[21] Twenty-eight State constitutions still guarantee each unit at least one representative in one or both branches of the legislature,[22] including eight which attach enough weight to the county or town as a unit to guarantee the subdivisions equal representation in one house regardless of size.[23]

Quite apart from constitutional history, we assume that political subdivisions have a claim to recognition

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[21] In giving this illustration we do not imply that the Congress and State legislatures are properly to be compared. See pp. 73–84 below.

[22] One house: Alabama, Arkansas, Georgia, Iowa, Kansas, Louisiana, Maine, Maryland, Mississippi, Missouri, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Utah. Both houses: Arizona, Connecticut, Delaware, Hawaii, Idaho, Nevada, New Jersey, New Mexico, Rhode Island, South Carolina, Vermont, Wyoming.

[23] Arizona, Idaho, Maryland, Nevada, New Jersey, New Mexico, South Carolina, Vermont. Montana provides for equal representation by statute. Maryland departs from this rule to the extent of giving Baltimore City six senators.

in the apportionment of representatives. Their representation as units may be a *bona fide* method of ensuring that representation is sufficiently diffused to prevent leaving particular interests or areas without a voice in the legislature. Historic political subdivisions with other governmental functions come to have a coherence, unity of interest and sense of identity. In a State where representation has historically been based upon such units, these characteristics may mean that, to a considerable degree, the representative goes to the legislature to express the opinion formed by the county or town after community discussion.[24]

When one house of a bicameral legislature is apportioned substantially according to population, the Fourteenth Amendment may leave considerable room in the other house for recognition of conflicting objectives. We assume as much *arguendo*, reserving judgment until the questions are presented.[25] Nevertheless, the desire to accord political subdivisions recognition as such will not support virtually submerging the principles of voter equality and majority rule by excluding them from all consideration in one branch and subordinating them in the other. In Maryland, as a result of the apportionment of equal

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[24] The practice of giving some recognition to political subdivisions with independent significance, coherence and sense of identity must be sharply distinguished, however, from the creation of new legislative districts (such as Michigan's former Senate districts) that serve no purpose except to assign representatives to artificial geographical areas without regard to population. See *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N.W. 2d 350, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 24, this Term.

[25] See pp. 24–25 above.

votes to each county (with additional senators for Baltimore City), one-seventh of the people of Maryland elect a majority in the State Senate. The voters in the least populous county have 32 times the *per capita* representation of the most populous. In the ten least populous counties a senator represents, on the average 21,493 voters, while the senator from Montgomery County represents 340,928 voters, and the senator from Prince George's represents 357,395—ratios close to 15 to 1. Furthermore, the lower house is not apportioned by population. Thirty-six percent of the people elect a majority of the House; the disparity between the most overrepresented and most underrepresented runs as high as 6 to 1. Needless to say the discrimination runs in favor of the same rural areas in both houses, so that the imbalances tend to reinforce, not counteract each other. We submit that such gross inequality is manifestly unconstitutional.

In the Alabama case the apportionments provided in the proposed constitutional amendment and the standby Crawford-Webb Act suffer from the same defects. Senators from counties with less than 20 percent of the State's population would compose a majority of the Senate and representatives from counties with hardly more than forty percent of the population—42.1 percent—would control the lower house. Voters in each of the least populous counties would have five times the representation of the voters of Jefferson County in the lower house and more than fifty times their representation in the Senate.

Since these are major issues in the pending cases, we discuss the point here only enough to outline the argument.[26] In our view the principles of voter equality and majority rule are too vital a part of our constitutional philosophy to permit States thus to submerge them in the interest of recognizing political subdivisions. Constitutional history gives little support for such a practice. Even though the same formal rules are found in early State constitutions, they did not then create the grave injustices, gross inequalities and the rule by small minorities they sometimes yield today. Nor were the disparities which then existed within the several States regarded by the Founding Fathers as inherently desirable or worthy of preservation.[27] In addition, the conditions that gave rise to the practice of representation in State legislatures by political subdivision have largely changed and the justifications have diminished. Even if the objectives be relevant and permissible within limits, the discrimination resulting in the case of the Maryland and Alabama legislatures is so gross as to be arbitrary and capricious.

On this point the New York case is closer, but we believe that even if the apportionment of the State Senate is not invalid because of the discrimination based upon irrelevant if not invidious criteria, nevertheless the inequalities in *per capita* representation in both houses of the legislature are too great to be supported by the only available justifications.

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[26] For full discussion in the context of the Maryland apportionment, see pp. 57–90 below.

[27] See pp. 62–65 below.

See Brief for the United States in *WMCA, Inc.* v. *Simon*, No. 20, this Term, pp. 32–37.

II

THE PRESENT APPORTIONMENT OF THE MARYLAND LEGISLATURE DENIES PETITIONERS EQUAL PROTECTION OF THE LAWS

A. THE APPORTIONMENT OF THE MARYLAND SENATE DISCRIMINATES WITHOUT RHYME OR REASON IN FAVOR OF VOTERS IN BOTH THE RURAL COUNTIES AND BALTIMORE CITY AGAINST VOTERS IN BALTIMORE, PRINCE GEORGE'S AND MONTGOMERY COUNTIES

The equal protection clause condemns an apportionment that discriminates in the representation accorded different groups of citizens in a State legislature without rhyme or reason. This proposition rests upon two settled principles: (1) "The Constitution in enjoining the equal protection of the laws upon States precludes irrational discrimination as between persons or groups of persons in the incidence of a law (*Goesaert* v. *Cleary*, 335 U.S. 464, 466); and (2) the Fourteenth Amendment applies to the apportionment of representatives (Point I, pp. 26–50 above). If there is substantial discrimination in voting power as among citizens, the equal protection clause is violated unless the discrimination can be justified by some permissible objective of State policy. *Baker* v. *Carr*, 206 F. Supp. 341 (M.D. Tenn.) (after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431, 439–440 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 580 (E.D. Va.), pending on appeal, No. 69, this Term; *Davis* v. *Synhorst*, 217 F. Supp. 492,

499, 501 (S.D. Iowa); *Moss* v. *Burkhart*, 207 F. Supp. 885, 893, 898, and unreported opinion, July 17, 1963 (W.D. Okla.); *Thigpen* v. *Meyers*, 211 F. Supp. 826, 831–832 (W.D. Wash.), pending on appeal, No. 381, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 184–185, 188, 189–191 (D. Del.), pending on appeal, No. 307, this Term; *Lisco* v. *McNichols*, 208 F. Supp. 471, 477–478 (D. Colo.); *Toombs* v. *Fortson*, 205 F. Supp. 248, 256 (N.D. Ga.); *Scholle* v. *Secretary of State*, 367 Mich. 176, 116 N.W. 2d 350, pending on appeal *sub nom. Beadle* v. *Scholle*, No. 24, this Term; *Sweeney* v. *Notte*, 183 A. 2d 296, 303, 305–306 (R.I. Sup. Ct.).

It cannot be denied that the apportionment of one senator to each Maryland county and to each of the six election districts in the City of Baltimore creates gross disparities in the voting power of different citizens, measured *per capita*. Kent County, the most overrepresented, has one senator for 15,481 people. Baltimore County, the most underrepresented, has one senator for 492,428 people.[28] The disparity is in the ratio of 32 to 1. Taking the ten least populous of Maryland's 23 counties, each of their senators represents, on the average, 21,493 people, while the senator from Montgomery County represents 340,928 people and the senator from Prince George's 357,395—ratios over 15 to 1.

We assume, but only for the purposes of the present argument,[29] that those discriminations might be shown rational if it were Maryland's policy to appor-

[28] The computations are all made from the tables attached to the dissenting opinion at R. 185–186.

[29] See pp. 24–25 above and pp. 57–90 below.

tion Senate seats on the basis of equality among counties. We also assume that the political history of the City of Baltimore and its present status as a separate political subdivision would justify allocating a seat to the city as if it were one of the counties. But the City of Baltimore receives six senators, not one. We can discover no possible justification for discriminating against the voters of Baltimore, Prince George's and Montgomery Counties as compared to both the City of Baltimore and the rural counties. The lack of uniformity apparently results from an exercise of sheer political power based upon *no* policy.

That the discrimination favors both the urban voters in Baltimore City and the rural voters in the sparsely populated counties over Baltimore, Prince George's and Montgomery Counties is vividly demonstrated by the following table:

County (or Balt. City)	Senators	Population (1960)	Population per senator	Ratio to Baltimore City	Ratio to 10 rural counties
Baltimore City	6	939,024	156,504	1.00	0.14
Ten rural counties	10	214,930	21,493	7.28	1.00
Baltimore	1	492,428	492,428	.32	.04
Prince George's	1	357,395	357,395	.44	.06
Montgomery	1	340,928	340,928	.46	.06

The arguments customarily made in support of apportionment on the basis of political or geographical subdivisions instead of voter-population or total population are inadequate support for the pattern of discrimination shown above. Every contention that can be made for geographical diffusion of voting power, for the avoidance of domination by the concentrated voting power in a large city, for reserving votes to give every locality some representative, or for avoiding excessively large districts, cuts against

favoring the voters of Baltimore City over the voters of Baltimore, Prince George's and Montgomery counties. Even if rural voters actually possessed their fabled superiority,[30] the voters of Baltimore, Prince George's and Montgomery Counties would come closer to possessing that enviable virtue than the people of Baltimore City, for surely even those who credit the fable do not believe that the supposed virtue resides in the country and large city but not in the small city or suburbs.

Perhaps the historical explanation of the award of extra senators to Baltimore City is partly that it

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[30] For example, Henry J. Cookinham stated at the New York Constitutional Convention of 1894 (4 Revised Record of the Constitutional Convention of 1894 of the State of New York, pp. 10-11):

> I say without fear of contradiction, successful contradiction, that the average citizen in the rural district is superior in intelligence, superior in morality, superior in self-government, to the average citizen of the great cities. * * * I know what the culture of the great cities is. But I know, furthermore, that the lower strata of society in the great cities is such that when the balance is struck, and the average citizen is produced, he is not a citizen so well worthy of confidence as the average citizen in the rural districts. The stream will never be purer than the fountain, and the government is founded upon the average citizen and not the cultured and wealthy classes.

Another delegate to the same convention, in explaining the overrepresentation of rural areas at the expense of urban areas, stated (*id.* at 87):

> * * * that not only the population composed of many who were unfitted for citizenship but territory upon which live thousands of men not as great in number, but of greater force and power, and greater intellect, should also be represented; and that is the scheme of this apportionment.

was necessary to correct the most egregious inequity from the failure to apportion on the basis of population (Opinion below, R. 169). But the constitutionality of a statute is to be judged by its application to current conditions. *Chastleton Corp.* v. *Sinclair*, 264 U.S. 453; *Brown* v. *Board of Education*, 347 U.S. 483, 492–493. If Maryland is to add five senators to the upper house beyond one for each county and Baltimore City in order to take care of the most egregious inequalities—assuming the basic arrangement to be constitutional—equal protection requires the even-handed distribution of the additional seats. Balitmore City could receive, at most, three of the five additional seats and Baltimore County and Prince George's County would each receive one.[21]

It may be suggested that this attack upon the apportionment of the Maryland Senate as a crazy-quilt is captious because it would leave Maryland free to assign one senator to each county—an apportionment that would result in a much wider departure from the principle of majority rule. One answer is that such an apportionment would be unconstitutional for other reasons given below (pp. 57–90). Even if its validity be assumed, the argument cannot defeat the challenge to the present arbitrary discrimination between both Baltimore City and the rural counties, on the one hand, and Prince George's, Montgomery and Baltimore counties, on the other. Arbitrary dis-

[21] It can readily be calculated from the table on page 52 above that this is the distribution which would result from giving an additional seat up to five to the counties whose citizens would otherwise have the lowest *per capita* representation.

crimination has repeatedly been condemned by the Court in other contexts even though the decision left the State with power to subject the victim of the discrimination to the same regulation, or perhaps even to more severe regulation, provided that the law was applied even-handedly to all persons similarly situated. See, *e.g.*, *Griffin* v. *Illinois*, 351 U.S. 12, where the Court, after stating that a defendant has no constitutional right to an appeal, determined that, if the State allows appeals generally, it must ensure that indigents have adequate appellate review; *Skinner* v. *Oklahoma*, 316 U.S. 535, where the Court specifically refused to decide whether the sterilization of all habitual criminals would be constitutional, but held that it was unconstitutional to distinguish between those guilty of larceny and embezzlement; *Brown* v. *Board of Education*, 347 U.S. 483, where the Court, without holding that a State is constitutionally required to provide public schools at all, held that a school system providing separate-but-equal facilities for children of different races violated the equal protection clause.

Moreover, although the main thrust of the guarantee of equal protection is to protect those lacking political power against arbitrary discrimination, it also has the very practical consequence of discouraging unjust laws. If a legislature is forced to choose between applying an unjust law evenhandedly and abandoning the law, it may well choose the latter course. The same practical consequences are even more likely to follow the invalidation of arbitrary distinctions in apportioning seats in a legislative body.

The ability of a combination of forces to work out an apportionment of the Maryland Senate that gives control of the Senate to senators representing 14 percent of the people, but takes care of the City of Baltimore by favoring it over Prince George's, Montgomery and Baltimore counties, is no proof that minority control could be maintained if Baltimore City's representatives in the legislature or a constitutional convention were forced to recognize that there could be no discrimination in favor of Baltimore over other areas with large populations. The court below recognized that the favoritism towards Baltimore City assured its neutrality (R. 169–170):

> The instant case is a contest for political power between the larger and the smaller counties, and Baltimore City is not concerned.

If the arbitrary discrimination which operates as a purchase price for Baltimore's neutrality is invalidated, as we submit the Fourteenth Amendment requires, a new combination of political forces might well compel an apportionment that permitted majority rule.

Finally, we point out that the court of appeals erred in brushing aside the wholly capricious discrimination as "not far out of line" (R. 169). Baltimore and Prince George's counties contain 27 percent of the Maryland population. They have only seven percent of the votes in the Senate. Giving them the two senators that measure the hostile discrimination between them and Baltimore City at its minimum, would increase their share to 14 percent—

a grossly inadequate figure but double their vote today.

B. THE APPORTIONMENT OF THE MARYLAND LEGISLATURE VIOLATES THE EQUAL PROTECTION CLAUSE BY SUBORDINATING POPULAR REPRESENTATION TO THE REPRESENTATION OF POLITICAL SUBDIVISIONS TO SUCH A DEGREE AS TO CREATE GROSS INEQUALITIES AMONG VOTERS AND GIVE CONTROL TO SMALL MINORITIES IN BOTH HOUSES OF THE LEGISLATURE

We have already demonstrated the grave inequalities in *per capita* representation in the Maryland Senate. One-seventh of the people elects a majority of the senators. The House of Delegates is also apportioned in a manner that results in substantial inequalities. Thirty-six percent of the people elect a majority of the House. The disparity between voters in the most overrepresented and most underrepresented counties runs as high as 6 to 1. The discrimination runs in favor of the same rural areas in both houses, so that the imbalances tend to reinforce, not counteract each other. We submit that the resulting inequalities are so great and the departure from the principle of majority rule is so excessive as to constitute a denial of equal protection of the laws. As Chief Judge Brune, dissenting, said in the court below (R. 179):

> Geography simply cannot be divorced from people as a basis for representation. How large must the population of a geographical political subdivision be in relation to that of other subdivisions in order to afford a reasonable base for representation? We grant that no exact mathematical rule or guide should be attempted by this Court; but it seems to us that when the

disparity in population reaches the point where it has no rational justification, the limit of permissible discrimination is passed.

The gross inequalities may be further demonstrated by a few additional statistics. In the Senate the greatest disparity, measured by population, is between the voters of Kent County, who have one senator for 15,481 people, and the voters of Baltimore County, who have one senator for 492,428 people—a ratio of 32-1. Other examples, almost as dramatic, are readily available. There are eight counties—Calvert, Caroline, Garrett, Kent, Queen Anne's, Somerset, Talbot and Worcester—in each of which the voters have at least 20 times the representation *per capita* of a voter in Baltimore County.

The discrimination also runs against other large counties. The disparity between voters in Talbot and Prince George's is 16½ to 1; as between Garrett and Montgomery it is 16½ to 1; and between Queen Anne's and Anne Arundel it is 12½ to 1. Indeed, each of the voters in the eight small counties listed above has more than 8 times the representation of a voter in Anne Arundel, 14 times the representation of a voter in Montgomery, and about 15 times the representation of a voter in Prince George's.

The four populous counties suffering from those inequalities contain more than 40 percent of the people of Maryland, yet they are permitted to vote for only 13.7 percent of the Senate. On the other hand, the ten smallest counties, which have only 7 percent of the people, choose 34.5 percent of the

Senate. A majority of the Senate is elected by 14 percent of the people.

Under legislation enacted in 1962 the Maryland House of Delegates is apportioned two delegates to each of the 29 counties, two to each legislative district in the City of Baltimore and the remaining 65 delegates on the basis of population, but with the qualification that no county should have the number of its representatives reduced (Appendix A, pp. 92–94 below). The resulting inequalities in the House favor the same voters who are already overrepresented in the Senate. The people of Kent County, who have 32 times the *per capita* representation of the people of Baltimore County in the Senate, have 4.9 times their representation in the House. Again this is not an isolated example. There are eight counties with more than four times the *per capita* representation of voters in Baltimore County, nine with more than three times the representation of voters in Anne Arundel, and eight with more than four times the representation of voters in Montgomery and Prince George's. Only 36 percent of the people elect a majority of the delegates, and they include the even smaller minority—14 percent—who control the Senate.

Any attempt to compare the total representation of different counties is somewhat artificial because senators and delegates are incommensurable, but an estimate can be made by treating one senator as equal to five delegates, that being very nearly the ratio of the total number of senators (29) to the total num-

ber of delegates (142). The following table compares the total representation, thus calculated, of the eight smallest counties to the total representation of Baltimore, Prince George's and Montgomery Counties:

County	Population	Units of representation	Population per unit
Baltimore	492,428	18	27,357
Prince George's	357,395	15	23,826
Montgomery	340,928	15	22,728
Calvert	18,826	7	2,261
Caroline	19,462	7	2,780
Garrett	20,420	8	2,332
Kent	16,481	7	2,212
Queen Anne's	16,909	7	2,367
Somerset	19,623	8	2,453
Talbot	21,878	8	2,697
Worcester	23,733	8	2,966

On this basis every voter in each of the eight smallest counties receives eight to ten times the representation of voters in Baltimore, Prince George's or Montgomery counties.

To justify such great disparities—among the most marked in the United States—the strongest kind of showing should be required. The right to equal treatment as a voter, including the right to equal representation *per capita*, is among the most precious of civil rights. Our entire history teaches the ideals of voter equality and majority rule. The status of the right is shown (a) by constitutional history and practice and (b) in the decisions of the Court.

(a) We noted above (pp. 29–31) that equal voting rights for all Americans have been increasingly recognized through amendments to the Constitution and that population is the dominant criteria in State constitutions for apportioning their legislatures. Even

at the beginning of our history as a nation, the founding fathers were virtually unanimous in holding that basic fairness demanded that all voters be represented equally in the legislature.[32] Thus, Thomas Jefferson repeatedly denounced the inequality of representation provided by the Virginia Constitution of 1776 and just as often proposed changing the Constitution to provide that both houses be apportioned on the basis of population (Appendix B, pp. 114–117). For example, he said that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns * * * by representatives chosen by himself * * *" (Appendix B, pp. 116–117). A few years later, he remarked that "[e]qual representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified" (Appendix B, p. 117). Several States, other than Virginia, which were unequally apportioned during the colonial period, changed their constitutions after independence to rectify the unfairness. Hacker, *Congressional Districting* (Brookings Institution, 1963), p. 5. And the Northwest Ordinance, which was adopted by the Congress of the Confederation in the same year that the constitutional convention was held, specified that "[t]he inhabitants of the [Northwest] [T]erritory shall always be entitled to the benefits * * * of a proportionate representation of the people in the legislature." Sec. 14, Art. II.

[32] The support for this statement is set forth at length in Appendix B to this brief, which is printed separately.

In the federal convention at Philadelphia, the framers of the Constitution made clear their common assumption that fair representation requires apportionment on the basis of population, voters, property, or taxes paid.[33] Throughout the convention, unequal apportionment was denounced in almost violent terms. Madison, for example, called it "evidently unjust," "a principle wch. was confessedly unjust, which ed. never be admitted," and "departing from justice" (Appendix B, pp. 4, 27, 38). James Wilson of Pennsylvania called inequality "a poison contaminating every branch of Govt." and "a vicious principle," and said that equal representation was "the inherent, indisputable, and unalienable rights of men" (Appendix B, pp. 12, 56, 31). Pierce Butler of South Carolina described the plan for giving each State an equal number of seats in the Senate as "evidently unjust"; Rufus King of Massachusetts likewise called it "a vicious principle of representation"; and Alexander Hamilton said that "[i]t shocks too much the ideas of Justice, and every human feeling" (Appendix B, pp. 39, 35, 14). See also, *e.g.*, the remarks of Madison (Appendix B, pp. 22, 24, 27, 39, 53, 60); Wilson (Appendix B, p. 6); Elbridge Gerry of Massa-

[33] Apportionment based on property or taxes paid was considered in the eighteenth century as a fair apportionment since these factors even justified denying the right of suffrage entirely. Thus arguments for apportionment based on taxes are arguments for equitable apportionment; they are inconsistent with allocating political subdivisions equal or minimum representation. Since that time, property and taxes have been rejected both as a qualification for suffrage and for apportionment except that poll taxes are still required to vote in some States and the New Hampshire Senate is apportioned on the basis of direct taxes paid from the several counties.

chusetts (Appendix B, pp. 29–30). In contrast, the delegates termed representation based on population "fair representation" (letter of George Mason of Virginia, Appendix B, p. 3), "just representation" (George Read of Delaware, Appendix B, p. 18), "the true, equitable mode of representation" (William Samuel Johnson of Connecticut, Appendix B, p. 54) and "the natural and precise measure" (Wilson, Appendix B, p. 56). See also Madison in the Federalist Papers (Appendix B, pp. 70–71).

The framers of the Constitution also specifically adverted to the apportionment of State legislatures in discussing the apportionment of the national legislature. Hugh Williamson, in arguing for representation based on population in the national legislature, "illustrated the cases by a comparison of the different States, to Counties of different sizes within the same State; observing that proportional representation was admitted to be just in the latter case * * *." I *Records of the Federal Convention* (Farrand ed., 1911), p. 180. Luther Martin of Maryland and James Madison of Virginia made clear that they agreed with this sentiment (see Appendix B, pp. 19–20, 23, 63–64).[34]

[34] As far as we can ascertain, only two brief remarks during the whole convention are inconsistent with those cited in the text above and with others included in Appendix B. Nathaniel Gorham of Massachusetts said that the moderate deviations from equality in the Massachusetts constitution were "expedient" (Appendix B, p. 18). Gouverneur Morris of Pennsylvania spoke approvingly of efforts in his own State to prevent backwoodsmen from having their fair representation in the legislature because he thought that they might attain control (Appendix B, p. 53). This was part of Morris' argument that the representation of new States in the national legislature should be limited so that they never could attain a majority. Madison and others vigorously opposed the proposal (Appendix B,

And on several occasions during the ratifying conventions various delegates, including Madison, attacked the unfair representation which then existed in some States (Appendix B, pp. 93–94, 98).[35]

While several of the States had one or more legislative bodies which were malapportioned at the time the Constitution was adopted, the situation had improved, as we have noted (p. 61), since colonial days. Three of the remaining malapportioned legislatures—South Carolina, Rhode Island, and Connecticut—were pointed to and severely criticized in the ratifying conventions (see Appendix B, pp. 93–94, 98). See also Jefferson's criticism of the Virginia apportionment provisions, Appendix B, pp. 114–117, and *Baker* v. *Carr, supra,* 369 U.S. at 309 (Mr. Justice Frankfurter dissenting). But even where a State provided the same representation for each county regardless of population, which on its face might lead to severe inequalities, the fairly even distribution of population generally mitigated the evil. For example, while the 1776 Maryland Constitution provided for the election of the Senate by two electors chosen by

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p. 53), and the convention rejected it, as well as many of Morris' other ideas which were inconsistent with the prevailing, more democratic views.

[35] It is true that the framers provided in the new constitution for a Senate which was apportioned equally among the States instead of on the basis of population. However, as we show below, in showing the irrelevancy of the "federal analogy" to the United States Senate (pp. 73–82), this provision was in no way inconsistent with the accepted view that unequal representation, as measured by population, was fundamentally unfair in a government which directly governed the people. The framers saw no inconsistency because they saw the government being created as a mixture of the old confederation of States and a national government composed of the people of the whole country.

the people of each county and one apiece for Baltimore City and Annapolis, a minimum of 40 percent of the people was required to elect a majority of the electors. See pp. 82–83 below. Later, in our history, the movement of population to urban areas made the same methods of apportionment many times more discriminatory against urban centers. For example, equal representation of each county with the addition of seats for Baltimore City, now enables not 40 percent, but 14 percent of the people to elect a majority of the Senate.

In short, practice and democratic theory were not nearly so far apart in 1789 as today. But even if they were, what are most relevant are our aspirations, not our failures. Throughout our history, persons in power have all to often used it for their own ends. Nonetheless, in construing the First Amendment, the Court has looked to the nobler statements of Jefferson and Madison, not to the occasions on which church and State have been mixed or freedom of speech has been hindered. Similarly, we submit, the Court should look to the basic concepts of democracy of Jefferson, Madison, and the other founding fathers, not to the use of power by those living on the seacoast and then later by those living in rural areas to protect their own interests. For it is the basic notions of democracy which are incorporated into the equal protection and due process clauses of the Fourteenth Amendment.

(b) Just as history reveals the high value placed upon equal representation in government according to population, so do the decisions of this Court emphasize the high degree of justification required for

State discrimination in matters of personal liberty and political right. Stated generally, the criterion for judging the constitutionality of classifications is whether the differentiation is rational or is arbitrary and unreasonable (see the cases cited above, p. 33), but what justification is rational and what is arbitrary depends in large part upon the kind of inequality the State has created.

In passing upon the constitutionality of taxes and regulatory laws the Court allows a wide area of legislative discretion and will usually sustain all but invidious or fanciful differentiations lacking an intelligible basis. See, *e.g.*, *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Railway Express Agency* v. *New York*, 336 U.S. 106. In contrast, where civil liberties are involved, far more than a merely intelligible classification is required. Inequality in punishment or technical procedure, for example, may be supported by distinctions between larceny and embezzlement, but they will not justify discrimination in permitting procreation. *Skinner* v. *Oklahoma*, 316 U.S. 535. In dealing with personal liberty the legislature may not draw distinctions that would support differences in taxation or social legislation. *Griffin* v. *Illinois*, 351 U.S. 12.

While the Court has occasionally upheld State action distinguishing between aliens and other residents (see *Terrace* v. *Thompson*, 263 U.S. 197), it has stated repeatedly that the mere rationality of the distinction is not sufficient. In *Oyama* v. *California*, 332 U.S. 633, 646, the Court said that "only the most exceptional circumstances can excuse discrimination

on [the basis of racial descent]" and therefore held unconstitutional a State statute forbidding aliens ineligible for citizenship from owning or leasing agricultural land. Accord, *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410.

The burden upon the State to justify classifications in matters of civil liberty was explicitly noted in *Skinner* v. *Oklahoma, supra.* At the very beginning of its opinion holding unconstitutional a statute providing for the sterilization of habitual criminals who have committed larceny but not those who have embezzled, the Court said (316 U.S. at 536):

> This case touches a sensitive and important area of human rights. Oklahoma deprives certain individuals of a right which is basic to the perpetuation of a race—the right to have offspring.

Later, in actually holding the statute unconstitutional, the Court went on to say (*id.* at 541):

> We are dealing here with legislation which involves one of the basic civil rights of men. Marriage and procreation are fundamental to the very existence and survival of the race. * * * [The sterilized person] is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We advert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in a sterilization law is essential, lest unwittingly or otherwise, invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws.

The Court's special concern for equality of political rights, as well as personal liberty, was explicitly stated in *Yick Wo* v. *Hopkins*, 118 U.S. 356, where the Court held that the equal protection clause forbade the licensing of laundries in a manner which prohibited all laundries operated by Chinese subjects and permitted other laundries to continue. In reaching this decision, the Court analogized the right of livelihood to the right to fair participation in one's own government, the right which is involved in the instant case (*id.* at 370):

> [T]he very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself.
>
> There are many illustrations that might be given of this truth which would make manifest that it was self-evident in the light of our system of jurisprudence. The case of the political franchise of voting is one. Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will under certain conditions, nevertheless *it is regarded as a fundamental political right, because preservative of all rights.* [Emphasis added.] [36]

The right to an equal voice in the processes of government is not only a personal right but goes to

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[36] This Court's equal protection cases cited above are discussed in McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 672–677.

the heart of democracy. In *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, note 4, Mr. Justice Stone raised the question "whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than are most other types of legislation." See also *Minersville School District* v. *Gobitis*, 310 U.S. 586, 599–600 (overruled on other grounds in *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 642). Writing specifically of legislation affecting the right to vote, Judge Cooley stated (2 Cooley, *Constitutional Limitations* (8th ed., 1927), p. 1370):

> All regulations of the elective franchise, however, must be reasonable, uniform and impartial; they must not have for their purpose directly or indirectly to deny or abridge the constitutional right of citizens to vote, or unnecessarily to impede its exercise; if they do, they must be declared void.

Discriminatory regulation of the right to equal representation, even more than restrictions upon freedom of communication, destroys the essential preconditions of alert democracy. Those whose voice is greatly diluted by malapportionment have almost no protection by exercise of their franchise. Inequalities such as those found in Maryland can be corrected only by self-destruction of the malapportioned legislature—a most unlikely eventuality—or by the courts,

or conceivably, but unlikely, by constitutional convention.[37]

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[37] The apportionment of the Senate is fixed by Article III, § 2 of the Maryland Constitution, which can be changed only by constitutional amendment. Under Maryland law, this can be done in two ways: first, Article XIV, § 1 of the Maryland Constitution provides that by 3/5 vote of the membership of each House of the General Assembly a constitutional amendment may be submitted to the people for their approval by majority vote. As we have seen above (pp. 8, 13), the rural counties, which are greatly overrepresented in the legislature, elect 66 percent of the Senate and 44 percent of the House of Delegates. Thus, a substantial number of representatives of the rural counties in both houses would have to vote against their own and their counties self-interest to submit a constitutional amendment to the people.

Second, Articles XIV, § 2, and Article XVII, § 9, provide for taking "the sense of the People in regard to calling a Convention for altering this Constitution" in 1970 and every 20 years thereafter and that the legislature shall pass a statute at its next session calling a convention if "a majority of voters at such election * * * shall vote for a Convention." In 1950, the people of Maryland voted almost 4 to 1 in favor of calling a constitutional convention. Nonetheless, the legislature, dominated, as we have seen, by representatives of rural counties, rejected ten bills which would have actually called a convention and none has been called (see pp. 9–10 above). This issue of a constitutional convention will not appear on the ballot again until 1970.

Appellees suggest that the failure to call the convention was justified because less than half the voters at the election voted in favor of the convention since half the voters did not vote on the issue (R. 93–94). Assuming this is a correct construction of State law—the Maryland Court of Appeals said that it did not have jurisdiction to rule on this issue in its first decision because it constituted an abstract question of law (R. 62)—this demonstrates that the voters have no practical way to change the apportionment. As occurred in Maryland in 1950, large numbers of voters generally do not vote on referenda and such voters, coupled with those from rural counties, are very likely to constitute a majority. Moreover, the question of calling a constitutional convention raises many other difficult issues which may confuse the voters and

In addition to the quality of the right, the Court should take into account the degree of inequity. Slight differences may be supported upon grounds utterly inadequate to justify grosser discrimination. Even if a policy of recognizing governmental subdivisions will support some differentiation in *per capita* representation (see pp. 24–25 above), this is not enough to sanction the gross inequalities revealed in the present record. See *Baker* v. *Carr*, 206 F. Supp. 341, 345–346 (M.D. Tenn.) after remand by this Court); *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sobel* v. *Adams*, 208 F. Supp. 316, 321–323 (S.D. Fla.); *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Davis* v. *Synhorst*, 217 F. Supp. 492, 499 (S.D. Iowa); *Sweeney* v. *Notte*, 183 A. 2d 296, 301, 302 (R.I. Sup. Ct.).[38]

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even those in favor of apportionment may vote against a convention on other grounds. See the government's brief in *WMCA, Inc.* v. *Simon*, No. 20 this Term, pp. 27–28.

Even if a constitutional convention is called, the constitution provides that delegates are to be apportioned the same as representatives in both houses of the legislature. Art. XIV, § 2. Thus, a majority of the delegates to the convention will be elected by the overrepresented rural counties. And finally, as we argue in our brief in the *WMCA* case, we do not believe that persons may be deprived of their personal constitutional rights merely because other persons have the opportunity to correct the inequality and do not choose to do so.

[38] The Rhode Island Supreme Court stated in *Sweeney* v. *Notte*, 183 A. 2d at 301:

> [A]pportionment along geographical, county, municipal or urban versus rural lines does not necessarily constitute a denial of equal protection if the rationale of such methods can be justified. * * * It is equally true that historical

Nor is it a fatal objection that this kind of evaluation poses questions of degree. The pricking out of shades of distinction, case by case, is the very essence of constitutional adjudication.

In theory, if there is room in one house of a bicameral legislature for some degree of representation of political subdivisions without strict regard to population, there would seem to be room for a lesser degree of deviation in both.[39] Nothing in the Four-

recourse to such apportionment formulae cannot be justified if it results in invidious discrimination. The dilution of the vote of a majority of electors to one fourth of that enjoyed by others is, in our opinion, so unjust as to be invidiously discriminatory.

In *Baker* v. *Carr*, the district court, after the remand from this Court, stated that (206 F. Supp. at 346):

> We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units. These subdivisions constitute an integral and historic part of the state's governmental structure. They have real and substantial interests in the state's laws, and the state could reasonably conclude that its best interests would be subserved by their effective participation in state government and in the formulation of its laws and policies. The state has the right, if it sees fit, to assure that its smaller and less populous areas and communities are not completely overriden by sheer weight of numbers.

However, the Court went on to state that this protection for smaller counties could not be accomplished in an arbitrary manner and held the new apportionment unconstitutional.

[39] The weight of authority since *Baker* v. *Carr* holds that the question whether an apportionment violates the equal protection clause cannot be answered without taking into account both houses of a bicameral legislature. *Sims* v. *Frink*, 208 F. Supp. 431, 439–440 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Sobel* v. *Adams*, 208 F. Supp. 316, 323 (S.D. Fla.); *Baker* v. *Carr*, 206 F. Supp.

teenth Amendment distinguishes between the two houses. In practice, the simplest and accepted way of accommodating different bases of representation is to follow one in the upper house and the other in the lower—an arrangement that may claim additional value as a check or balance.[40] Constitutional adjudication should not ignore either governmental practicalities or political tradition. If one house of a legislature is apportioned substantially in accordance with population, there may be room for variation in the other.[40a] But surely there can be no justification of substantial discrimination against the same people in their *per capita* representation in both houses.

No justification has been made—or, in our view could be offered—in the present case. The history and analogies on which the court below chiefly relied give no support for its decision.

(i). The United States Senate is distinguishable for two reasons. First, the principle of equal representation in the Senate, combined with popular representation in the House of Representatives, was part of an historic compromise between sovereign States agreeing to form a federal union. It was not a com-

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341 (M.D. Tenn.) (after remand by this Court); *Nolan* v. *Rhodes*, U.S.D.C., S.D. Ohio, decided June 12, 1963; *Sweeney* v. *Notte*, 183 A. 2d 296, 302 (R.I. Sup. Ct.); *Maryland Committee for Fair Representation* v. *Tawes*, Circuit Court, Anne Arundel County, Maryland, decided May 24, 1962.

[40] As we show below (pp. 87–90), however, bicameralism and the desirability of a check and balance within the legislature do not require that one house deviate substantially from a fair apportionment based on population.

[40a] See pp. 24–25.

promise over what constitutes a fair apportionment; such compromises frequently occur and the manner in which an apportionment is decided is largely irrelevant in determining whether or not it is arbitrary and therefore violates the Fourteenth Amendment. The compromise in the constitutional convention was over the nature of the new union. Those who favored a legislature made up of one house with each State represented equally—the same apportionment as in the Congress of the Confederation—uniformly believed that the new government should merely be a reconstruction of the old Confederation, although with additional power to meet the problems the Confederation had been unable to solve. Thus, they saw the new government as a Confederation of sovereign States with powers in areas in which the individual States had been ineffective. On the other hand, the advocates of a legislature, whether made up of one or two houses, apportioned entirely according to population [41] invariably considered the proposed constitution as establishing an entirely new government operating directly on the people with the States in a decidedly subordinate role. Ultimately, because the deadlock over the basic nature of the government and the apportionment which depended on this question threatened to prevent the adoption of a new constitu-

[41] Some of the framers who would have varied the representation among the States supported apportionment based on property or taxes rather than population. However, as we stated above (p. 62, note 33), such proposals are today more consistent with apportionment based on population than with apportionment giving each political subdivision equal representation or guaranteed minimum representation.

tion, the delegates compromised. They deliberately decided to establish a government which operated directly on the people, but was composed of sovereign States. The House of Representatives was considered as representing the people, while the Senate represented the States. Thus, the apportionment of the Congress was seen as reflecting the nature of the new government—a mixture of a national government,[42] which would have required representation based on population, and a Confederation, which would have required equal representation from each of the States.

The nature of the compromise can best be understood from a few quotations. On the one hand, the proponents of the New Jersey or small-state plan for equal representation among the States agreed that, if a national government were formed, the only fair apportionment would be on the basis of population. Thus, William Paterson of New Jersey, who submitted the New Jersey plan to the convention, stated (I *Records of the Federal Convention* (Farrand ed., 1911), p. 178):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes

[42] The terms, national and federal government, were given various meanings at the convention. Regardless of the labels attached, however, Madison, Wilson and the others who supported representation based on population believed in a real national government, not a Confederation and not even the government, which they considered a mixture, that resulted.

> equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.[43]

Later, he said that apportionment based on population "is right in principle" if "state distinctions are done away; but those to certain purposes still exist." *Id.* at 259. Luther Martin of Maryland, a vigorous supporter of the small-state plan who ultimately opposed the Constitution, likewise said (*id.* at 453):

> In a federal government, a majority of states must and ought to tax. In the local government of states, counties may be unequal—still numbers, not property, govern. What is the government now forming, over states or persons? * * *
>
> * * * * * * * * * Your general government cannot be just or equal upon the Virginia plan [for apportionment based on population] unless you abolish state interests.

Similar remarks were made by other proponents of equality of representation among the States in Congress: David Brearly of New Jersey (Appendix B, p. 7); Robert Lansing of New York (Appendix B, p. 13); George Read of Delaware (Appendix B, p.

[43] Paterson is here referring to a proposal of David Brearly of New Jersey that, if the Confederation is to be ended, the States should be abolished, new States should be formed with equal population, and representation in the legislature should be the same for each State (see Appendix B, p. 7). Madison objected on the ground that the proposal was impractical (see Appendix B, p. 16).

31). In contrast, the proponents of the small-state plan favored equal representation among the States on the ground that the States were to remain sovereign. See the remarks of Paterson (Appendix B, pp. 6, 7, 11, 12); Brearly (Appendix B, p. 7); Roger Sherman of Connecticut (Appendix B, pp. 9, 25); Robert Lansing of New York (Appendix B, p. 13); Alexander Martin of North Carolina (Appendix B, p. 16); William Samuel Johnson of Connecticut (Appendix B, p. 17); Luther Martin of Maryland (Appendix B, pp. 19–21; 37), Oliver Ellsworth of Connecticut (Appendix B, p. 32); Gunning Bedford of Delaware (Appendix B, p. 36).

On the other hand, the most vigorous supporters of apportionment based on population agreed that equal representation among the States was appropriate if the government was to be a confederation of sovereign States.[*] For example, George Mason of Virginia said (*id.* at 161):

> The treaties, leagues, and confederacies between different sovereign, independent powers have been urged as proofs in support of the propriety and justice of the single and equal representation of each individual State in the American Union; and thence conclusions have been

[*] Occasionally supporters of apportionment based on population attacked the Confederation because the apportionment among the States equally (one vote per State) was unfair (see Appendix B, pp. 6, 29–30, 45, 60). The reasons for these attacks were the alleged extortion of this apportionment, and as is suggested in Madison's speech quoted in the text below on page 78, the view that even the Confederation was not made up of entirely sovereign States since it provided that the Confederation, not the States, had ultimate power over war and foreign affairs.

> drawn that the people of these United States would refuse to adopt a government founded more on an equal representation of the people themselves, than on the distinct representation of each separate, individual State. If the different States in our Union always had been as now substantially and in reality distinct, sovereign and independent, this kind of reasoning would have great force * * *.

Madison likewise said that (*id.* at 446):

> The fallacy of the reasoning [of the delegates supporting the New Jersey plan] drawn from the equality of Sovereign States in the formation of compacts, lay in confounding mere Treaties, in which specified certain duties to which the parties were to be bound, and certain rules by which their subjects were to be reciprocally governed in their intercourse, with a compact by which an authority was created paramount to the parties, & making laws for the government of them.

See also remarks of James Wilson of Pennsylvania (Appendix B, p. 13). The supporters of apportionment based on population invariably favored a sovereign national government with broad powers. See the remarks of Wilson (Appendix B, pp. 13, 18); Madison (Appendix B, pp. 22–23, 27, 60); Rufus King of Massachusetts (Appendix B, pp. 58–59); the letters of Mason (Appendix B, pp. 2, 3); the notes of Robert Yates of New York on the convention (Appendix B, pp. 37–38).

The framers explicitly described the resulting compromise as to the apportionment of Congress as reflecting a more basic compromise concerning the nature

of the government. William Samuel Johnson of Connecticut remarked (*id.* at 461–462):

> The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. * * * [A]s in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people,* ought to be represented; in the *other* the *States.* [Emphasis in original.]

The compromise was repeatedly described in similar terms both in the convention itself and during the proceedings leading to ratification. See, *e.g.*, the remarks at the convention of Oliver Ellsworth of Connecticut (Appendix B, pp. 30–31); Roger Sherman of Connecticut (Appendix B, p. 9); William Richardson Davie of North Carolina (Appendix B, pp. 33–34); Elbridge Gerry of Massachusetts (Appendix B, pp. 39, 44); James Madison (Appendix B, p. 60); the remarks of George Cabot, Fisher Ames and E. Pierce at the Massachusetts convention and James Iredell at the North Carolina convention (Appendix B, pp. 90–91, 100); and Madison's writings in Numbers 39 and 62 of the Federalist Papers and in a letter to Jefferson (Appendix B, pp. 69, 71–72, 77–78).

In contrast to the federal government, even admitting, as the court below stated (R. 166), that the coun-

ties in Maryland have broad powers and have always been an important part of the government, they have never been sovereign and independent. As this Court said in *Hunter* v. *Pittsburgh*, 207 U.S. 161, 178, "[t]he number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the State." Counties in Maryland, as elsewhere in the country, are mere subdivisions created by the State with no independent powers of their own. *E.g., Howard County Commissioners* v. *Matthews*, 146 Md. 553, 127 Atl. 118. The government of Maryland is not a mixture of a confederation of counties and a government operating directly on the people of Maryland. Consequently, there is no analogy to the federal government. The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of population."

The second basis for distinguishing Maryland from the federal Congress is that, even if the federal and state governments could be compared, the second house of Congress, the federal House of Representatives, is apportioned among the States in accordance with population. The guarantee of one representative to each State works out quite differently from Mary-

"The Maryland Court of Appeals cited Madison for the proposition that the United States Senate was based on that of Maryland. However, as the appellants point out in their brief (pp. 46–47), the Maryland Senate was the model only for the indirect election of the Federal Senate. Madison repeatedly made clear at the constitutional convention and elsewhere that fairness demanded equal representation in the legislature on the basis of population. See Appendix B, pp. 4, 15–16, 22–24, 27, 33, 38–39, 45, 48, 53, 60–61, 70–71, 117–118.

land's guarantee of two delegates to each county and electoral district in Baltimore—plus guaranteeing each county and district at least the seats it had under a former apportionment deviating substantially from equality as measured by population—because there are enough seats in Congress to allow true distribution in accordance with population whereas in Maryland there are not nearly enough. Of the 435 incumbents of the House, only four come from States (Vermont, Wyoming, Nevada and Alaska) which have less than 1/435 of the population. It takes representatives from States with almost 50 percent of the population to constitute a majority of the federal House of Representatives [46]—but only 36 percent of the people can control Maryland's House of Delegates.

This Court has already rejected one federal analogy in *Gray* v. *Sanders*, 372 U.S. 368, 378, where the Court held unconstitutional the Georgia county unit system for the election of statewide officials. The Court explained (*id.* at 378):

> We think the analogies to the electoral college * * * are inapposite. The inclusion of the electoral college of the Constitution as the result of specific historical concerns, validated the collegiate principle despite its inherent numerical inequality, but implied nothing about the use

[46] Because of unfair districting by State legislatures, only 42 percent of the population reside in *districts* electing a majority of Congressmen. As our brief in *Wesberry* v. *Sanders*, No. 22, this Term, indicates (pp. 30–35), State statutes districting Congressmen so as to deviate substantially from an equal number of inhabitants in each district may very well be unconstitutional.

of an analogous system by a State in a statewide election.

The electoral college is just as analogous to the Georgia county unit system as the United States Senate is to the upper house of the State legislatures.

For the foregoing reasons there is no merit in the Court of Appeals' suggestion (R. 169) that Maryland and the United States are being judged by different rules."

(ii). There is nothing in Maryland's own history to vindicate the inequalities that exist today. The Constitution of 1776 (Article XIV) provided for the indirect election of the Senate. Two electors were chosen by the people from each county and one apiece from Baltimore and Annapolis Cities. The electors chose 15 senators, of whom 9 had to be from the western shore and 6 from the eastern. Based on the 1790 census, this resulted in 40 percent of the

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" Except for the courts below, two other courts have relied on this "federal analogy" to the Congress in deciding the constitutional standard for apportioning State legislatures. *Toombs* v. *Fortson*, U.S.D.C., N.D. Ga., decided September 5, 1962; *Nolan* v. *Rhodes*, U.S.D.C., S.D. Ohio, decided June 12, 1963. Four courts have rejected the analogy. *Sims* v. *Frink*, 208 F. Supp. 431, 438 (M.D. Ala.), pending on appeal *sub nom. Reynolds* v. *Sims*, Nos. 23, 27, 41, this Term; *Mann* v. *Davis*, 213 F. Supp. 577, 584 (E.D. Va.), pending on appeal, No. 69, this Term; *Sincock* v. *Duffy*, 215 F. Supp. 169, 186–187, 183 (D. Del.), pending an appeal, *sub nom. Roman* v. *Sincock*, No. 307, this Term; *Jackman* v. *Bodine*, 78 N.J. Super. 414, 188 A. 2d 642, 651 (despite upholding the apportionment on other grounds). See also *One Man-One Vote*, *supra*, pp. 8–9; McKay, *Reapportionment and the Federal Analogy* (National Municipal League, 1962), pp. 4–6, 8–9; McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, 689–692.

people choosing a majority of the electors. As to the Senators themselves, the eastern shore had 40 percent, but only 34 percent of the population. An 1837 amendment to the Constitution ended the indirect election of Senators and provided for 1 senator from each county and 1 from Baltimore City. As a result, the Senate was controlled by representatives of 33 percent of the population. The 1851 Constitution (Article 3, Section 3) kept the same apportionment. This resulted, under the 1860 census, in reducing the percentage of the population necessary to elect a majority of the Senate to 29 percent. In 1864 the Constitution was changed (Art. III, Sections 2, 3) to give each county one senator and to give three to Baltimore City to be distributed among three legislative districts. This meant that, at the start, based on the 1860 census, 32 percent of the people elected a majority of the Senate. The 1867 Constitution (Article 3, Section 2) continued the previous apportionment of the Senate. In 1900 and 1922, amendments to the 1867 Constitution resulted in increasing the number of senators and legislative districts to four and six, respectively. Maryland Laws, 1900, ch. 469; *id.* 1922, ch. 7. Despite the increased representation for Baltimore City, the new apportionments following each amendment resulted in 23 and 21 percent of the people, respectively, electing a majority of the Senate. The percentage had fallen to 17 percent by 1940. Today it is only 14 percent.

In short, although her Senate has for many years been made up of an equal number of senators from each county (with additional senators from Baltimore

City), the inequalities in representation have been growing steadily greater as the relative population of four counties increased. Manifestly, the present extreme malapportionment finds no historical justification.

(iii). Nor can vindication be found in the practice of other States. Only seven other State constitutions apportion one house of the legislature wholly upon the basis of equality among political subdivisions regardless of population, and all those apportion the other house according to population except that they guarantee each political subdivision a minimum of one.[48] Maryland is one of the worst apportioned States in the country in the degree of inequality when measured by population. As of 1955, it was ranked forty-fourth among the then 48 States in representativeness. See I David & Eisenberg, *Devaluation of the Urban and Suburban Vote: A Statistical Investigation of Long-Term Trends in State Legislative Representation* (University of Virginia, 1961), p. 5. Since that time the increasing growth of urban areas has made the Senate even less representative than before, while the House of Delegates has been only slightly improved.

(iv). If we go behind history and analogies to the underlying reasons for recognition of political subdivisions, the lack of present justification for the inequalities of *per capita* representation in the Maryland legislature becomes all the more apparent, even if they were justified formerly. Geographic and political subdivisions are seldom any longer separate

[48] The seven States are listed on p. 46, note 23 above.

little communities with identities and interests of their own. People are more mobile. Newspapers, radio, and television produce a rapid interchange of knowledge and opinion upon a wider scale. More often than not geographical and political lines do not even correspond to community interests and social and economic organization.

For similar reasons it is easier for candidates to become known today in much wider circles than their own town or county, and for them to understand and speak effectively for interests beyond its immediate borders. On the other hand, the occasions for formally canvassing public issues in local communities as a unit in order to reach a consensus that its delegate might represent as its spokesman in the wider assemblage have gradually diminished.[49]

(v). On the facts of the present case it can scarcely be argued that the present apportionment of the Maryland legislature is necessary "to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former." *MacDougall v. Green*, 335 U.S. 281, 284. In the *MacDougall* case the Court was dealing not with representation in the legislature, but with the nomination of candidates for office by petition. In providing for nomination by signed petition there are strong reasons for re-

[49] Some of the Braintree town meetings which John Adams represented in the General Court of Massachusetts are described in I Smith, *John Adams* (1962), pp. 6–7, 80–81, 105.

quiring diffusion of the signers. A candidate without support in several areas would presumably have little chance for election in a statewide ballot. Moreover, it is probably much easier to obtain large numbers of signatures in counties having "concentrated masses" than in those "thinly populated." That the Court was addressing itself to those aspects of the process of nomination by petition, not representation, seems apparent not only from the issue before it but also from the use of the term "political initiative."

The same considerations are not applicable in the composition of a legislature. There is no evidence to support a claim that opportunities for effective political action are more available in urban or suburban areas than rural counties. The available evidence suggests that a higher proportion of the eligible voters casts ballots in rural counties than in metropolitan areas.[30a] There is no way in which populous counties can offset the effects of being underrepre-

[30] In Maryland there was 57.2 percent participation in the Presidential election in 1960. In Baltimore City the participation was 53.9 percent as against 58.7 percent for the rest of the State. In Prince George's County the participation was below the statewide average—53.4 percent whereas Baltimore County with 65.6 percent and Montgomery County with 66.3 percent were far above.

The figures from New York also tend to dispel the fiction of greater political opportunities on the part of urban voters. The statewide average was 67 percent participation whereas there was only 57.8 percent participation in New York City. The latter figure may be partially explained by the fact that the population totals, being made up of all persons 21 years of age and over, includes aliens and transients; there is a higher percentage of both in New York City.

sented in the legislature even by the most adroit political organization. "Bloc voting," *i.e.*, predictable voting, appears to be as prevalent in rural areas as in cities. See *One Man—One Vote, supra*, p. 7. Indeed, it may be argued with force that rural areas, with a less heterogeneous population and a closer identity of interest, have greater social pressures leading to political cohesion than do urban areas. See Emerson, *Malapportionment and Judicial Power*, 72 Yale L.J. 64, 73.

Granting that some degree of representation of political subdivisions may be a way of making certain that every significant area, however small in population, has some spokesman for its interests in the legislature, that consideration would not justify the present apportionment of the Maryland legislature. The allocation to each county of one seat in the House of Delegates would accomplish that objective. Today each county has two such seats and also equal representation in the Senate. As a result, virtually the entire Senate and 40 percent of the House is apportioned before taking into account the element of population. Surely, this makes "diffusion" a euphemism for gross discrimination.

(vi). It should also be apparent that there is no merit to the court of appeals' suggestion that the present apportionment or something like it is justified by the "very purpose of having two houses * * * that each would be a check upon the other, and prevent the passage of hasty and ill-conceived legislation" (R. 168). The gross inequalities in the representation of population or voters in the Maryland legislature is unnecessary to achieve the pur-

poses of a bicameral legislature. *First,* unless the senators and delegates were mere automatons reflecting the same estimates of sentiment in their constituencies, the very existence of two chambers would make one a check upon the other. Two bodies tend to develop different traditions and ideas. Moreover, the mere existence of a second body to scrutinize pending proposals slows down the legislative process and produces greater study and deliberation.[51] See, *e.g., Mann* v. *Davis* 213 F. Supp. 577, 584–585 (E.D. Va.), pending on appeal, No. 69, this Term, and the authorities therein cited; Wilson, *The State* (1898), pp. 487–489.

Second, there are ample other ways of providing a somewhat different composition of each body. The length of the terms of office might be made different.[52] The Maryland Senate has only 29 members as contrasted to 142 in the House. Senators will neccessarily represent larger areas than do delegates and consequently senators must be responsive to broader interests.[53] If one house were apportioned

[51] On returning from France after the constitutional convention, Jefferson is supposed to have asked Washington why he agreed to a second chamber in Congress: Washington, the story goes, replied: "Why did you pour that coffee into your saucer." Jefferson replied, "To cool it." "Even so," Washington said, "we pour legislation into the senatorial saucer to cool it." See III Records of the Federal Convention (Farrand ed., 1911), p. 359.

[52] The Maryland Constitution now provides for four-year terms for members of both houses. Art. III, Sections 2, 6.

[53] Congressmen from New York, for example, have a wide range of conflicting views which are generally different from those of New York's Senators who must represent and be responsive to the whole State.

by popular representation, perhaps there would be room for argument for the need to give some recognition of the principle of representation of established political subdivisions in the other, but the claim of need for a different basis of representation is utterly unavailing where neither house is apportioned according to population.

Third, the practice of the States in this country demonstrates that bicameralism is not inconsistent with the same apportionment of both houses. The constitutions of ten States have identical methods of apportionment in both houses.[54] Moreover, even in States where the apportionment methods appear to be substantially different, the effect is to have the same areas overrepresented and underrepresented in both houses. For example, this is true of both the apportionment in Maryland (see pp. 58–60 above) and of New York (see the Brief of the United States as Amicus Curiae in *WMCA, Inc.* v. *Simon,* No. 20, this Term, pp. 24–25, 33–34.

In short, history and political theory alike belie the suggestion that gross malapportionment is a prerequisite to a bicameral legislature. See United States Advisory Commission on Intergovernmental Relations; *Report, Apportionment of the State Legislatures, supra,* pp. 72–73; Hacker, *Congressional Districting: The Issue of Equal Representation, supra,* p. 37; *One Man—One Vote, supra,* pp. 9–11; McKay,

[54] The ten States with the same methods of apportionment in both houses are Indiana, Massachusetts, Minnesota, Oregon, South Dakota, Tennessee, Washington, West Virginia, Wisconsin, and Wyoming. All but Wyoming base the apportionment of both houses on population.

Reapportionment and the Federal Analogy, supra, pp. 9–10. When the malapportionment extends to both houses, the lesson is all the plainer.

The great weight of judicial opinion, since *Baker v. Carr,* is opposed to the decision of the Maryland Court of Appeals. All of the reasons which have been suggested in defense of the overwhelming disparities which prevail in the State of Maryland are plainly wanting. It is unnecessary to go further and to speculate upon other arguments which might conceivably be advanced. "Discriminations are not be be supported by mere fanciful conjecture." *Hartford Steam Boiler Inspection Co.* v. *Harrison,* 301 U.S. 459, 462; *Borden's Farm Products Co.* v. *Baldwin,* 293 U.S. 194, 209.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Maryland Court of Appeals should be reversed.

ARCHIBALD COX,
Solicitor General.
BRUCE J. TERRIS,
Assistant to the Solicitor General.
RICHARD W. SCHMUDE,
Attorney.

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APPENDIX A

Sections 1, 2 and 5 of Article III of the 1867 Maryland Constitution, as amended, provide as follows:

Section 1.

The Legislature shall consist of two distinct branches; a Senate and a House of Delegates, and shall be styled the General Assembly of Maryland.

Section 2.

The City of Baltimore shall be divided into six legislative districts as near as may be of equal population and of contiguous territory, and each of said legislative districts of Baltimore City, as they may from time to time be laid out, in accordance with the provisions hereof, and each county in the State, shall be entitled to one Senator, who shall be elected by the qualified voters of the said legislative districts of Baltimore City and of the counties of the State, respectively, and shall serve for four years from the date of his election.

Section 5.

The membership of the House of Delegates shall consist of one hundred and twenty-three (123) Delegates, apportioned as follows: Calvert, Caroline, Charles, Howard, Kent, Queen Anne's, and St. Mary's Counties, two Delegates each; Cecil, Garrett, Somerset, Talbot and Worcester Counties, three Delegates each; Carroll, Dorchester, Hartford, and Wicomico Counties, four Delegates each; Allegany, Anne Arundel, Baltimore, Frederick, Montgomery, Prince George's, and Washington Counties, and each of the six legislative districts of Baltimore City, six Delegates each.

The Act of the Special Session of the Maryland General Assembly, ch. 1, approved May 31, 1962, which added Section 42 to Article 40 of the Maryland Code, provides as follows:

> *Section 1. Be it enacted by the General Assembly of Maryland,* That new Section 42 be and it is hereby added to Article 40 of the Annotated Code of Maryland (1957 Edition), title "General Assembly" to follow immediately after Section 41 thereof, and to be under the new sub-title "Apportionment," and to read as follows [Article 40, § 42, Maryand Annotated Code (1962) Supp.)]:
>
> (a) The membership of the House of Delegates shall consist of one hundred and twenty-three Delegates. Each county and each legislative district of Baltimore City shall have two Delegates as a minimum, making a total of fifty-eight (58) Delegates. The remaining sixty-five (65) Delegates shall be apportioned on a basis of relative population, as in this section provided.
>
> (b) There shall be an apportionment of representation in the House of Delegates in the following manner: Within one year after the publication of each census the Governor by proclamation shall announce the population determined in the census for each county and for each legislative district of Baltimore City. If the Federal census does not determine the population by legislative districts in Baltimore City, the Governor shall estimate the population of the several legislative districts by using the Federal census figures for wards and blocks within the City, or if that method is impractical, then by such other reliable method as may be feasible; and the Governor's determination of the population of each legislative district shall be conclusive. In the proclamation the Governor also shall announce the number of Delegates to which each county and legislative district is entitled according to the formula

and requirements contained in this section. At the time of the next regular election to the House of Delegates following such proclamation the number of Delegates specified in the proclamation shall be elected in the counties and legislative districts respectively. The apportionment above made shall continue until changed under the provisions of this section.

(c) Each county and each legislative district of Baltimore City shall be entitled to the minimum representation in the House of Delegates provided for in sub-section (a) of this section. Additional representation, subject to a total of sixty-five (65) additional Delegates and based on the population of each county and each legislative district as determined by each official decennial Federal census, shall be in accordance with the following formula:

The total population of the state according to the census shall be divided by the number sixty-five (65). The resulting quotient, computed as the nearest whole number, is the unit of population necessary for an additional Delegate. The unit of population, as divisor, shall then be divided into the population of each county in the state and of each legislative district of Baltimore City which has a population in excess of the unit of population. Each county and legislative district shall receive an additional number of Delegates equal to the resulting quotient in each instance, dropping any fractional remainder. If the total number of Delegates so apportioned is fewer than one hundred and twenty-three (123), additional Delegates shall be awarded in descending order to those counties or legislative districts having the highest fractional share of a unit of population as a remainder after the last mentioned quotients have been computed, until the total of one hundred and twenty-three (123) Delegates is apportioned.

(d) Not later than December 31, 1965, the Governor shall make the estimations of popula-

tion and the proclamation required in subsection (b), based upon the Federal census of 1960. The primary and general elections for the House of Delegates during the year 1966 shall be for such number of Delegates in each county and legislative district as previously determined under the provisions of this subsection; and this section is fully effective when the House of Delegates which is elected in November, 1966, has qualified and entered upon its term of office.

(e) Notwithstanding anything to the contrary in subsections (a), (b), (c) and (d) of this section, during the four-year term of the House of Delegates which is elected to office in November, 1962, and for any additional period during which this section may be extended each county and legislative district as a minimum shall have the number of Delegates in the House of Delegates that it had on January 1, 1962. For those four years, the formula for membership in sub-section (c) based upon the Federal census of 1960 shall be applied as to those counties and legislative districts for which it provides an increase in representation, but the formula shall not be applied as to those counties and legislative districts for which it would provide a decrease in representation, or as to which it leaves representation unchanged.

(f) In accordance with the formula in subsection (c), the number of additional memberships in the House of Delegates, for which nominations are to be made by the local central committees, is as follows: Anne Arundel County, 1; Baltimore County, 7; Montgomery County, 4; Prince George's County, 4; Third District of Baltimore City, 2; Fifth District of Baltimore City, 1.

(g) The local central committee of each party which was elected on May 15, 1962, in the several counties or legislative districts respectively, shall nominate persons as candidates for the House of Delegates for the additional

memberships herein created. These nominations shall be made prior to August 1, 1962.

(h) The nominees, in the respective numbers indicated in sub-section (f), shall be so declared. They shall become nominees for the particular party and in the particular county or legislative district, for the purposes of the general election in the month of November, 1962, in all respects the same as nominees already selected by the primary election of May 15, 1962, for the particular party and in the particular county or legislative district. All nominees so nominated by the local central committees who are elected to office at the general election in November, 1962, and who subsequently are sworn into office as members of the House of Delegates of Maryland, have all the powers, privileges and duties accorded generally to members of the House of Delegates.

(i) Nothing in this section shall be construed or applied to change or in any manner to affect the party conventions held pursuant to Article 33 of the Annotated Code of Maryland, title "Elections," during the year 1962.

(j) This section established the membership of the House of Delegates of Maryland until such time as it is superseded by an amendment for that purpose to the Constitution of Maryland. This section automatically and with no further action required by the General Assembly is repealed and no longer in force as of the effective date of such an amendment to the Constitution; except that such repeal does not affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal, for the remainder of the term for which he has been elected.

Section 2. And be it further enacted, That this Act shall take effect on June 1, 1962. If this Act has not already been superseded by an

amendment to the Constitution of Maryland under the provisions of such sub-section (j) hereinabove, it shall expire automatically and with no further action required by the General Assembly of Maryland on January 1, 1966; provided, however, that if at the general election in the month of November 1964 there is submitted to the voters of the State of Maryland a proposed constitutional amendment which would so supersede the provisions of this section, and if at that time the voters of the State of Maryland reject and do not ratify this proposed constitutional amendment and the provisions of this Act shall expire automatically and with no further action required by the General Assembly of Maryland on January 1, 1970. In the event there is such an automatic repeal of this section either in 1966 or 1970 as provided hereinabove, the membership of the House of Delegates of Maryland thereafter shall be the same as it was in the several political sub-division and in its entirety on January 1, 1962. Nothing in such a repeal either in 1966 or 1970 shall affect the election, tenure, powers, privileges, and duties of any member of the House of Delegates in office at the time of the repeal for the remainder of the term for which he has been elected.

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APPENDIX B

1. The History of the Federal Constitution with Regard to Representation in Congress

a. The Convention.—The Confederation of the United States, which was formed in 1777 by the thirteen States, was explicitly a confederation of sovereign States. Articles of Confederation, Article II. Each State, although it could have two to seven delegates to the Congress, had a single vote. *Id.*, Art. V. While the power to make treaties and wage war was given to the Congress, most powers were reserved to the States. *Id.* Art. II, VI. For example, the Congress could not impose taxes, but could only ask the States to contribute particular sums. *Id.*, Art. VIII.

The lack of power of the Confederation to meet the growing problems of the former colonies led to a serious crisis. See *The Federalist*, Nos. 15–22 (Cooke ed., 1961), pp. 90–146. The convention in Philadelphia was called by the Congress by a resolution dated February 21, 1787, "for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union." III *Records of the Federal Convention* (Farrand ed., 1911),[1] 14. On May 18, 1787, a few days after the first delegates arrived in Philadelphia, Benjamin Franklin described the meeting as "a Convention of the prin-

[1] Hereinafter referred to as "Farrand."

cipal people in the several States, for the purpose of revising the federal Constitution, and proposing such amendments as shall be thoroughly necessary." Letter to Richard Price, May 18, 1787, *id.* at 21. Thus, both the Congress and Franklin conceived of the purpose of the convention as merely to revise the Confederation, but to keep its essential form.

On the other hand, some of the delegates arriving in Philadelphia were proposing to form an entirely different kind of government, a national government[2] in which representation in the legislature would be on the basis of population. George Mason, a delegate from Virginia, wrote his son on May 20, 1787 (III Farrand 23):

> The most prevalent idea in the principal States seems to be a total alternation of the present federal system, and substituting a great national council or parliament, consisting of two branches of the legislature, founded upon the principles of equal proportionate representation, with full legislative powers upon all the subjects of the Union; and an executive: and to make the several State legislatures subordinate to the national, by giving the latter the power of a negative upon all such laws as they shall judge contrary to the interest of the federal Union.

A few days later, on May 21, Mason wrote almost identical words to Arthur Lee. *Id.* at 24. That same day, George Read, a delegate from Delaware, wrote

[2] The terms national and federal government were used by the framers themselves in conflicting ways apparently for partisan advantage. Therefore, the meaning can be ascertained only from the particular context. We, however, use national government to mean a government operating directly on the people in which the States are plainly subordinate. We use Federal government to mean a government which can regulate certain areas but with the other areas remaining under the authority of sovereign States.

to John Dickinson, another delegate from Delaware, of a proposal for a new federal system (*id.* at 25):

> Some of its principal features are taken from the New York system of government. A house of delegates and senate for a general legislature, as to the great business of the Union. The first of them to be chosen by the Legislature of each State, in proportion to its number of white inhabitants, and three-fifths of all others, fixing a number for sending each representative. The second, to wit, the senate, to be elected by the delegates so returned, either from themselves or the people at large, in four great districts, into which the United States are to be divided for the purpose of forming this senate from, which, when so formed, is to be divided into four classes for the purpose of an annual rotation of a fourth of the members.[3]

Read warned that the small States must be careful to protect their interests. *Ibid.* George Mason wrote his son on June 1 that (*id.* at 32):

> The idea I formerly mentioned to you, before the Convention met, of a great national council, consisting of two branches of the legislature, a judiciary and an executive; upon the principle of fair representation in the legislature, with powers adapted to the great objects of the Union, and consequently a control in these instances, on the State legislatures, is still the prevalent one. Virginia has had the honor of presenting the outlines of the plan. * * *.

The convention held its first meeting on May 14, 1787, but was adjoined because of lack of a quorum. I Farrand 1. Soon after regular sessions started on May 25th, the convention started to do its work

[3] The New York Senate and Assembly were apportioned by eligible voters. New York Constitution of 1777, Articles 4, 12.

through a Committee of the Whole. On May 31, in debate on whether the first branch of the legislature should be elected directly by the people, George Mason (I Farrand 48–49):

> * * * argued strongly for an election of the larger branch by the people. It was to be the grand depository of the democratic principle of the Govt.

During debate on June 6th on whether the upper house of the new legislature should be elected by the state legislatures instead of the people, Pierce Butler of South Carolina stated that he opposed "determining the mode of election until the ratio of Representation is fixed—if that proceeds on a principle favorable to wealth as well as number of Free Inhabitants, I am content to unite wh. Delaware (Mr. Read) in abolishing the State Legislatures, and becoming one Nation instead of a confedn. of Republics—" [King].[4] I Farrand 144. The next day, in continuing the debate on the same proposals, Madison said that if the Senate was to be elected by the state legislatures (*id.* at 151):

> * * * we must either depart from the doctrine of proportional representation; or admit into the Senate a very large number of members. The first is inadmissible, being evidently unjust. The second is inexpedient.

George Mason stated (*id.* at 161):[5]

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[4] All references to the proceedings of the constitutional convention are to the official Journal or to Madison's notes unless otherwise indicated. Rufus King of Massachusetts and Robert Yates of New York also made notes of part of the proceedings to which we will occasionally refer.

[5] This quotation is from Mason's notes of a speech which Farrand believes was given on June 7. I Farrand 160–161, note 8.

> The treaties, leagues, and confederacies between different sovereign, independent powers have been urged as proofs in support of the propriety and justice of the single and equal representation of each individual State in the American Union; and thence conclusions have been drawn that the people of these United States would refuse to adopt a government founded more on an equal representation of the people themselves, than on the distinct representation of each separate, individual State. If the different States in our Union always had been as now substantially and in reality distinct, sovereign and independent, this kind of reasoning would have great force * * *.

On June 8th, Gunning Bedford of Delaware complained of attempts (I Farrand 167):

> * * * to strip the small States of their equal right of suffrage. In this case Delaware would have about 1/90 for its share in the General Councils, whilst Pa. & Va. would possess 1/3 of the whole. * * * This shows the impossibility of adopting such a system as that on the table, or any other founded on a change in the principle of representation.

The next day, June 9th, the Committee of the Whole considered the resolution (I Farrand 181):

> *Resolved, therefore, that the rights of suffrage in the national legislature ought to be apportioned to the quotas of contribution, or to the number of inhabitants, as the one or other rule may seem best in different cases.* [Yates]

A long debate ensued. William Paterson of New Jersey said that (*id.* at 177):

> * * * the proposition for a proportional representation [struck] at the existence of the lesser States. He wd. premise however to an investigation of this question some remarks on

> the nature structure and powers of the Convention. The Convention he said was formed in pursuance of an Act of Congs. that this act was recited in several of the Commissions, particularly that of Massts. which he required to be read: That the amendment of the confederacy was the object of all the laws and commissions on the subject; that the articles of the confederation were therefore the proper basis of all the proceedings of the Convention. We ought to keep within its limits, or we should be charged by our constituents with usurpation.

Paterson then stated (*id.* at 178):

> A confederacy supposes sovereignty in the members composing it & sovereignty supposes equality. If we are to be considered as a nation, all State distinctions must be abolished, the whole must be thrown into hotchpot, and when an equal division is made, then there may be fairly an equality of representation.

Paterson's notes for his speech on June 9th state (*id.* at 186):

> Each State is sovereign, free, and independent, etc. Sovereignty includes Equality—
>
> If then the States in Union are as States still to continue in Union, they must be considered as Equals—
>
> 13 sovereign and independent States can never constitute one Nation, and at the same Time be States—they may by Treaty make one confederated Body—

James Wilson of Pennsylvania, a proponent of a strong national government (I Farrand 179–180):

> * * * entered elaborately into the defence of a proportional representation, stating for his first position that as all authority was derived from the people, equal numbers of people ought to have an equal no. of representatives, and dif-

> ferent numbers of people different numbers of representatives. This principle had been improperly violated in the Confederation, owing to the urgent circumstances of the time. * * * Mr. P. admitted persons, not property to be the measure of suffrage. Are not the citizens of Pena. equal to those of N. Jersey? does it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other.

The next speaker, Hugh Williamson of North Carolina (*id.* at 180):

> * * * illustrated the cases by a comparison of the different States, to Counties of different sizes within the same States; observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former.

Judge David Brearly of New Jersey agreed with Paterson (*id.* at 181–182):

> If the states still remain sovereign, the form of the present resolve is founded on principles of injustice. He then stated the comparative weight of each state—the number of votes 90. Georgia would be 1, Virginia 16, and so of the rest. This vote must defeat itself, or end in despotism. If we must have a national government, what is the remedy? Lay the map of the confederation on the table, and extinguish the present boundary lines of the respective state jurisdictions, and make a new division so that each state is equal—then a government on the present system will be just. [Yates]

In contrast, Edward Carrington wrote Thomas Jefferson on the same day that the basic issues before the convention (III Farrand 38–39):

> * * * are reducible to two schemes—the first, a consolidation of the whole Empire into one republic, leaving in the states nothing more than subordinate courts for facilitating the administration of the Laws—the second an investiture of of [sic] a foederal sovereignty with full and independant authority as to the Trade, Revenues, and forces of the Union, and the rights of peace and War, together with a Negative upon all the Acts of the State legislatures. the first idea, I apprehend, would be impracticable, and therefore do not suppose it can be adopted—general Laws through a Country embracing so many climates, productions, and manners, as the United States, would operate many oppressions, & a general legislature would be found incompetent to the formation of local ones, as a majority would, in every instance, be ignorant of, and unaffected by the objects of legislation * * *. Something like the second will probably be formed—indeed I am certain that nothing less than what will give the foederal sovereignty a compleat controul over the State Governments, will be thought worthy of discussion * * *.

On June 11, 1787, a resolution was introduced (I Farrand 192–193):

> that the right of suffrage in the first branch of the national Legislature ought not to be according to the rule established in the articles of confederation; but according to some equitable ratio of representation * * * in proportion to the whole number of white and other free Citizens and inhabitants of every age; sex and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians, not paying taxes in each State.

The resolution was passed 8 to 2 by the Committee of the Whole with only New Jersey and Delaware opposing. Roger Sherman of Connecticut then proposed

for the first time the plan which was ultimately adopted for the Congress: "[t]hat in the second branch of the National Legislature each State have One vote." *Id.* at 193. Sherman explained (*id.* at 204):

> * * * that as the people ought to have the election of one of the branches of the legislature, the legislature of each state ought to have the election of the second branch, in order to preserve the state sovereignty; and that each state ought in this branch to have one vote. [Yates]

The resolution was rejected 6 states to 5. *Id.* at 193. James Wilson then proposed a resolution, which was seconded by Alexander Hamilton: "that the right of suffrage in the second branch of the national Legislature ought to be according to the rule established in the first." *Ibid.* This resolution was passed 6 to 5.

The debate on June 11th centered in large part on whether the legislature should be apportioned according to inhabitants or taxes.[6] John Rutledge of South Carolina (I Farrand 196):

> * * * proposed that the proportion of suffrage in the 1st branch should be according to the quotas of contribution. The justice of this rule he said could not be contested.

Pierce Butler of South Carolina supported Rutledge's proposal (*id.* at 204):

> [M]oney is strength; and every state ought to have its weight in the national council in

[6] New Hampshire still apportions its Senate by taxes paid. The support for this proposition at the convention reflects the belief that apportionment by taxes as well as by population was equitable, since the former constituted the contribution of the States to the federal government. On the other hand, equal representation to all the States, regardless of inhabitants or contribution, was considered by the supporters of apportionment according to taxes to be unfair.

> proportion to the quantity it possesses. [Yates]

John Dickenson likewise (*id.* at 196):

> * * * contended for the *actual* contributions of the States as the rule of their representation & suffrage in the first branch.

Elbridge Gerry of Massachusetts opposed the proposal because he (*id.* at 201):

> * * * thought property not the rule of representation. Why then shd. the blacks, who were property in the South, be in the rule of representation more than the cattle & horses of the North.

Benjamin Franklin said that he thought that (*id.* at 197–198):

> * * * the number of Representatives should bear some proportion to the number of the Represented; and that the decisions shd. be by the majority of members, not by the majority of States. This is objected to from an apprehension that the greater States would then swallow up the smaller * * *.
>
> But, Sir, in the present mode of voting by States, it is equally in the power of the lesser States to swallow up the greater * * *.

On June 14, the North Carolina delegates wrote to Governor Caswell that the problem of the convention was to form a "Union of Sovereign States; preserving their Civil Liberties and connected together by such Tyes as to Preserve permanent & effective Governments * * *. III Farrand 46.

The New Jersey plan was presented to the convention by Paterson on June 15. Its first sentence emphasized: "That a union of the States merely federal ought to be the sole Object of the Exercise of the Powers vested in this Convention." III Far-

rand 611. As to Congress, the plan provided (*id.* at 613):

> Resolved That every State in the Union as a State possesses an equal Right to, and Share of, Sovereignty, Freedom, and Independance—
> Resolved, therefore, that the Representation in the supreme Legislature ought to be by States, otherwise some of the States in the Union will possess a greater Share of Sovereignty, Freedom, and Independence than others * * *

The next day, Paterson explained the basic assumptions of the plan (I Farrand 250):

> * * * If the confederacy was radically wrong, let us return to our States, and obtain larger powers, not assume them of ourselves. * * * Our object is not such a Governmt. as may be best in itself, but such a one as our Constituents have authorized us to prepare, and as they will approve. If we argue the matter on the supposition that no Confederacy at present exists, it can not be denied that all the States stand on the footing of equal sovereignty. * * * If we argue on the fact that a federal compact actually exists, and consult the articles of it we still find an equal Sovereignty to be the basis of it. He reads the 5th. art: of Confederation giving each State a vote—& the 13th. declaring that no alteration shall be made without unanimous consent. This is the nature of all treaties.

Turning to the question of representation, he said (*id.* at 251):

> If the sovereignty of the States is to be maintained, the Representatives must be drawn immediately from the States, not from the people: and we have no power to vary the idea of equal sovereignty.

James Wilson replied strongly (*id.* at 253–254):

> He would not repeat the remarks he had formerly made as the principles of Representation. he would only [say] that an inequality in it, has ever been a poison contaminating every branch of Govt. In G. Britain where this poison has had a full operation, the security of private rights is owing entirely to the purity of her tribunals of Justice * * *. The political liberty of that Nation, owing to the inequality of representation is at the mercy of its rulers.

Paterson then responded (*id.* at 259):

> [R]epresentation must be drawn from the states to maintain their independency, and not from the people composing those states.
>
> The doctrine advanced by a learned gentleman from Pennsylvania [Wilson], that all power is derived from the people, and that in proportion to their numbers they ought to participate equally in the benefits and rights of government, is right in principle, but unfortunately for him, wrong in the application to the question now in debate.
>
> When independent societies confederate for mutual defence, they do so in their collective capacity; and then each state for those purposes must be considered as *one* of the contracting parties. Destroy this balance of equality, and you endanger the rights of the *lesser* societies by the danger of usurpation in the greater.
>
> Let us test the government intended to be made by the Virginia plan on these principles. The representatives in the national legislature are to be in proportion to the number of inhabitants in each state. So far it is right upon the principles of equality, when state distinctions are done away; but those to certain purposes still exist * * *.

In his notes, Rufus King shows how speakers favoring representation by population based their argu-

ment on the kind of government which was to be constituted. His notes state as to Robert Lansing of New York, who favored giving equal representation to all the States (I Farrand 263-264):

Lansing

Natl.	Fedl.
One Br. to come from the people in propn. to yr. numbers	To come from the State Legislatures equally & to represent the States
All acts of ind. States subject to a national Negative	To possess enumerated powers
Will absorb the State sovereignties & leave them mere Corporations, & Electors of the natl. Senate—	

Remarks—The confedn. admits the sovereignties of the States—it speaks of an Union—but it never meant a consolidation—If this had been in view NYk never wd. have sent Delegates * * *

Similarly, King's notes show as to Wilson, who proposed apportionment by population (*id.* at 265-266):

Wilson—contrasts the two—

Nat.	Fed.
Legis. of 2 Brs.	A Congress or one Br.
The People are the basis of Rep—	The Legislatures of the State
A repn. according to Numbers or Wealth	The States are equal

1st Where the principle of unequal Represtn. prevails there exists a poison wh. eventually will destroy it the Government—

On June 18, 1787, Alexander Hamilton attacked the New Jersey plan (I Farrand 286):

> Another destructive ingredient in the [New Jersey] plan, is that equality of suffrage which is so much desired by the small States. It is not in human nature that Va. & the large States should consent to it, or if they did that they shd. long abide by it. It shocks too much the ideas of Justice, and every human feeling * * *.

He also submitted to the Committee of the Whole a sketch of a plan for the new government.[7] The plan set the number of Representatives at the start for each State apparently on the basis of population. After that, the plan provided (III *id.* at 620):

> The Legislature shall provide for the future elections of Representatives, apportioning them in each State, from time to time as nearly as may be to the number of persons described in the 4 § of the VII article,[8] so as that the whole number of Representatives shall never be less than one hundred, nor more than hundred. There shall be a Census taken for this purpose within three years after the first meeting of the Legislature, and within every successive period of ten years.

The composition of the initial Senate was likewise to be prescribed by the constitution but the number for each State had not been filled in. As to the appor-

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[7] This plan was never actually before the convention. III Farrand 617.

[8] Article VII, Section 4 of the plan provided for the apportionment of direct taxes among the States by the number of inhabitants, except Indians not taxed and three-fifths of all other persons. III Farrand 628.

tionment of senators, Hamilton's plan provided (*id.* at 621):

> The Legislature shall provide for the future elections of Senators, for which purpose the States respectively, which have more than one Senator, shall be divided into convenient districts to which the Senators shall be apportioned. A State having but one Senator shall be itself a district. * * *
>
> The number of Senators shall never be less than forty, nor shall any State, if the same shall not hereafter be divided, ever have less than the number allotted to it in the second section of this article; but the Legislature may increase the whole number of Senators, in the same proportion to the whole number of Representatives as forty is to one hundred; and such increase beyond the present number, shall be apportioned to the respective States in a ratio to the respective numbers of their representatives.
>
> If States shall be divided, or if a new arrangement of the boundaries of two or more States shall take place, the Legislature shall apportion the number of Senators (in elections succeeding such division or new arrangement) to which the constituent parts were entitled according to the change of situation, having regard to the number of persons described in the 4. § of the VII article.

Thus, the apportionment of the new Senate was also to be based on population, although no State could have its representation reduced from that prescribed for the first Senate.

James Madison returned to the proposal of Judge Brearly that the boundaries of the States should be redrawn to provide equal population and they should be given equal representation in the legislature (I Farrand 321):

> It was admitted by both the gentlemen from N. Jersey, (Mr. Brearly and Mr. Pater-

> son) that it would not be *just to allow Virga.* which was 16 times as large as Delaware an equal vote only. Their language was that it would not be *safe for Delaware* to allow Virga. 16 times as many votes. The expedient proposed by them was that all the States should be thrown into one mass and a new partition be made into 13 equal parts.

Madison, however, decided that the plan was impracticable (*id.*, at 322):

> The prospect of many new States to the Westward was another consideration of importance. If they should come into the Union at all, they would come when they contained but but [sic] few inhabitants. If they shd. be entitled to vote according to their proportions of inhabitants, all would be right & safe. Let them have an equal vote, and a more objectionable minority than ever might give law to the whole.

Alexander Martin of North Carolina said (*id.* at 324):

> [The States] entered into the confederation on the footing of equality; that they met now to to [sic] amend it on the same footing, and that he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of Va. Massts. and Penna.

On June 20, the convention itself began to consider the proposals which had been made in committee. Robert Lansing of New York responded to Wilson's citation (see p. 12 above) of the corruption resulting from rotten boroughs in England (I Farrand 337):

> The point of Representation could receive no elucidation from the case of England. The corruption of the boroughs did not proceed from their comparative smallness: but from the actual fewness of the inhabitants, some of them not having more than one or two. a great in-

> equality existed in the Counties of England. Yet the like complaint of peculiar corruption in the small ones had not been made.

Roger Sherman again repeated his proposal to have two branches of the legislature apportioned differently (*id.* at 342–343):

> The disparity of the States in point of size he perceived was the main difficulty. But the large States had not yet suffered from the equality of votes enjoyed by the small ones. In all great and general points, the interests of all the States were the same. * * * If the difficulty on the subject of representation can not be otherwise got over, he would agree to have two branches, and a proportional representation in one of them, provided each State had an equal voice in the other. This was necessary to secure the rights of the lesser States; otherwise three or four of the large States would rule the others as they please.

The next day, William Samuel Johnson of Connecticut noted that James Wilson and the Virginians had said that they did not want to abolish the States (I Farrand 355):

> He wished it therefore to be well considered whether in case the States, as was proposed, shd. retain some portion of sovereignty at least, this portion could be preserved, without allowing them to participate effectually in the Genl. Govt., without giving them each a distinct and equal vote for the purpose of defending themselves in the general Councils.

The debate as to representation continued on June 25, 1787. Nathaniel Gorham of Massachusetts said that (I Farrand 404–405):

> * * * he inclined to a compromise as to the rule of proportion. He thought there was some

> weight in the objections of the small States. If Va. should have 16 votes & Delre. with several other States together 16. those from Virga. would be more likely to unite than the others, and would therefore have an undue influence. This remark was applicable not only to States, but to Counties or other districts of the same State. Accordingly the Constitution of Massts. had provided that the representatives of the larger districts should not be in an exact ratio to their numbers.* And experience he thought had shewn the provision to be expedient.

George Read of Delaware complained that the large States had appropriated the western lands which should have been applied to the public debt (*id.* at 405):

> Let justice be done on this head; let the fund be applied fairly & equally to the discharge of the general debt, and the smaller States who had been injured would listen then perhaps to those ideas of just representation which had been held out.

James Wilson opposed election of the second branch by the state legislatures (*id.* at 406):

> The Genl. Govt. is not an assemblage of States, but of individuals for certain political purposes—it is not meant for the States, but for the individuals composing them: the *individuals* therefore not the *States*, ought to be represented in it: A proportion in this representation can be preserved in the 2d. as well as in the 1st. branch; and the election can be made by electors chosen by the people for that purpose,

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* The Massachusetts Constitution of 1780 provided that the Senate would be apportioned among the districts on the basis of taxes paid. Part II, Ch. I, Sec. 2, Art. I. One member of the House of Representatives was apportioned to each town having 150 voters and an additional member for every 225 additional voters, except that each existing town was given at least one. Part II, Ch. I, Sec. 3, Art. II.

However, his amendment to this effect was not seconded.

Pierce Butler of South Carolina proposed postponing the issue as to the election of second branch until the question of representation was decided. James Madison seconded the proposal, but it was rejected 7 to 4. I Farrand 407–408. The convention then voted 9 to 2 to have the second house elected by the state legislatures, with Virginia and Pennsylvania opposing. At this point in his notes Madison dropped a footnote (*id.* at 408):

> It must be kept in view that the largest States particularly Pennsylvania & Virginia always considered the choice of the 2d. Branch by the State Legislatures as opposed to a proportional Representation to which they were attached as a fundamental principle of just Government. The smaller States who had opposite views, were reenforced by the members from the large States most anxious to secure the importance of the State Governments.

James Wilson of Pennsylvania likewise said at the convention (*id.* at 413):

> Equality of representation can not be established, if the second branch is elected by the state legislatures. [Yates]

In the debate on June 27th as to whether representation in the first house should be by population, Luther Martin of Maryland supported continuation of the state governments as under the Confederation. He said (I Farrand 437–438):

> [A]n equal vote in each State, was essential to the federal idea, and was founded in justice & freedom, not merely in policy: that tho' the States may give up this right of sovereignty, yet they had not, and ought not: that the States like individuals were in a State of nature

> equally sovereign & free * * *. [T]he States being equal cannot treat or confederate so as to give up an equality of votes without giving up their liberty: that the propositions on the table were a system of slavery for 10 States: that as Va. Masts. & Pa. have 42/90 of the votes they can do as they please without a miraculous Union of the other ten: that they will have nothing to do, but to gain over one of the ten to make them compleat masters of the rest * * *: that no State in ratifying the Confederation had objected to the equality of votes; that the complaints at present run not agst. this equality but the want of power; that 16 members from Va. would be more likely to act in concert than a like number formed of members from different States; that instead of a junction of the small States as a remedy, he thought a division of the large States would be more eligible.

Yates' account of this same speech states (*id.* at 440–441):

> This principle of equality, when applied to individuals, is lost in some degree, when he becomes a member of a society, to which it is transferred; and this society, by the name of state or kingdom is, with respect to others, again on a perfect footing of equality—a right to govern themselves as they please. Nor can any other state, of right, deprive them of this equality. If such a state confederates, it is intended for the good of the whole; and if it again confederate, those rights must be well guarded * * *. We must treat as free states with each other, upon the same terms of equality that men originally formed themselves into societies.
>
> * * * * *
>
> If the foundation of the existing confederation is well laid, powers may be added—You may safely add a third story to a house where the

> foundation is good * * *. Price says, that laws made by one man or a set of men, and not by common consent, is slavery—And it is so when applied to states, if you give them an unequal representation.

The next day, Luther Martin continued his speech (I Farrand 444-445):

> [T]he Genl. Govt. ought to be formed for the States, not for individuals: that if the States were to have votes in proportion to their numbers of people, it would be the same thing whether their (representatives) were chosen by the Legislatures or the people; the smaller States would be equally enslaved * * *.

Yates reports as to this speech (*id.* at 453–455):

> In a Federal government, a majority of states must and ought to tax. In the local government of states, counties may be unequal—still numbers, not property, govern. What is the government now forming over states or persons? As to the latter, their rights cannot be the object of a general government—These are already secured by their guardians, the state governments. The general government is therefore intended only to protect and guard the rights of the states as states. * * * Representation on federal principles can only flow from state societies * * *.
>
> * * * Your general government cannot be just or equal upon the Virginia plan, unless you abolish state interests. If this cannot be done, you must go back to principles purely federal.
>
> * * * * * *
>
> The admission of the larger states into the confederation, on the principles of equality, is dangerous—But on the Virginia system, it is ruinous and destructive. Still it is the true interest of all the states to confederate * * *.
>
> * * * * * *

> I would rather confederate with any single state, than submit to the Virginia plan. But we are already confederated, and no power on earth can dissolve it but by the consent of *all* the contracting powers—and four states, on this floor, have already declared their opposition to annihilate it * * *.

James Madison, in opposing the motion of Lansing that "the representation of the first branch be according to the articles of the confederation" [Yates] (I Farrand 455), said that (id. at 446–449):

> [H]e was much disposed to concur in any expedient not inconsistent with fundamental principles, that could remove the difficulty concerning the rule or representation. But he could neither be convinced that the rule contended for was just, nor necessary for the safety of the small States agst. the large States. That it was not just, had been conceded by Mr. Breerly [sic] & Mr. Patterson [sic] themselves. The expedient proposed by them was a new partition of the territory of the U. States. The fallacy of the reasoning drawn from the equality of Sovereign States in the formation of compacts, lay in confounding mere Treaties, in which were specified certain duties to which the parties were to be bound, and certain rules by which their subjects were to be reciprocally governed in their intercourse, with a compact by which an authority was created paramount to the parties & making laws for the government of them. If France, England & Spain were to enter into a Treaty for the regulation of commerce &c. with the Prince of Monacho & 4 or 5 other of the smallest sovereigns of Europe, they would not hesitate to treat as equals, and to make the regulations perfectly reciprocal. Wd. the case be the same if a Council were to be formed of deputies from each with authority and discretion, to

raise money, levy troops, determine the value of coin &c? Would 30 or 40 million of people submit their fortunes into the hands, of a few thousands? If they did it would only prove that they expected more from the terror of their superior force, than they feared from the selfishness of their feeble associates. Why are Counties of the same States represented in proportion to their numbers? Is it because the representatives are chosen by the people themselves? so will be the representatives in the Nationl. Legislature. Is it because, the larger have more at stake than the smaller? The case will be the same with the larger & smaller States. Is it because the laws are to operate immediately on their persons & properties? The same is the case in some degree as the articles of confederation stand; the same will be the case in a far greater degree under the plan proposed to be substituted. * * * By the plan proposed a compleat power of taxation, the highest prerogative of supremacy is proposed to be vested in the National Govt. Many other powers are added which assimilate it to the Govt. of individual States. The negative on the State laws proposed, will make it an essential branch of the State Legislatures & of course will require that it should be exercized by a body established on like principles with the other branches of those Legislatures. * * *

* * * * *

* * * In a word; the two extremes before us are a perfect separation & a perfect incorporation, of the 13 States. In the first case they would be independent nations subject to no law, but the law of nations. In the last, they would be mere counties of one entire republic, subject to one common law. In the first case the smaller states would have every thing to fear from the larger. In the last they would have

> nothing to fear. The true policy of the small States therefore lies in promoting those principles & that form of Govt. which will most approximate the States to the condition of Counties.

Yates reports that Madison said (*id.* at 457):

> There is danger in the idea of the gentleman from Connecticut. Unjust representation will ever produce it. In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises.[10]

Returning to the analogy of England's rotten boroughs, James Wilson said (I Farrand 449–450):

> The leading argument of those who contend for equality of votes among the States is that the States as such being equal, and being represented not as districts of individuals, but in their political & corporate capacities, are entitled to an equality of suffrage. According to this mode of reasoning the representation of the burroughs in Engld which has been allowed on all hands to be the rotten part of the Constitution, is perfectly right & proper. They are like the States represented in their corporate capacity like the States therefore they are entitled to equal voices, old Sarum [a rotten borough] to as many as London. And instead of the injury supposed hitherto to be done to London, the true ground of complaint lies with old

[10] The last sentence, supporting representation on a non-population basis, seems almost surely an error of the reporter. It is inconsistent with the first two sentences of the same account, as well as with numerous other statements made by Madison at the convention. Furthermore, it is not reflected in Madison's own detailed and presumably more accurate account of his speech which is quoted in the text above.

> Sarum; for London instead of two which is her proper share, sends four representatives to Parliament.

Yates says that Wilson stated (*id.* at 457):

> I should be glad to hear the gentleman from Maryland explain himself upon the remark of Old Sarum, when compared with the city of London. This he has allowed to be an unjust proportion; as in the one place one man sends two members, and in the other one million are represented by four members. I would be glad to hear how he applies this to the larger and smaller states in America; and whether the borough, as a borough, is represented, or the people of the borough.

Luther Martin answered that Britain's rotten boroughs were not analogous since (*ibid.*):

> Individuals, as composing a part of the whole of one consolidated government, are there represented. [Yates]

Roger Sherman argued for concessions by the larger State to protect the smaller. *Id.* at 450. He further stated (*id.* at 457):

> In society, the poor are equal to the rich in voting, although one pays more than the other. This arises from an equal distribution of liberty amongst all ranks; and it is, on the same grounds, secured to the states in the confederation * * *. [Yates]

Hugh Williamson of North Carolina supported representation based on population on the ground (*id.* at 456):

> If any argument will admit of demonsfration, it is that which declares, that all men have an equal right in society. Against this position, I have heard, as yet, no argument, and I could wish to hear what could be said against it * * *. [Yates]

On June 29th, William Samuel Johnson of Connecticut supported Roger Sherman's proposal that one house be apportioned on population and the other be apportioned equally among the States. In doing so, he explicitly based this proposal on a compromise as to the nature of the new government (I Farrand 461–462):

> The controversy must be endless whilst Gentlemen differ in the grounds of their arguments; Those on one side considering the States as districts of people composing one political Society; those on the other considering them as so many political societies. The fact is that the States do exist as political Societies, and a Govt. is to be formed for them in their political capacity, as well as for the individuals composing them. * * * On the whole he thought that as in some respects the States are to be considered in their political capacity, and in others as districts of individual citizens, the two ideas embraced on different sides, instead of being opposed to each other, ought to be combined; that in *one* branch the *people*, ought to be represented; in the *other*, the *States*.

Rufus King's account of this speech is (*id.* at 476–477):

> Those who contend for an equality of Votes among the States, define a State to be a mere association of men & then say these Associations are equal—on the other hand those who contend for a Representation in proportion to numbers, Define a State to be a District of Country with a certain Number of Inhabitants, like a parish or County, and then say, these districts shd. have an influence in proportion to their Number of Inhabitants—both reason justly from yr. premises—we must then compromise—let both parties be gratified—let one House or Branch be formed by one Rule & & [sic] the other by another.

Madison continued to oppose the compromise because it over-emphasized the sovereignty of the States under the new Constitution and because equal representation by States was unjust (I Farrand 463–464):

> [T]he mixed nature of the Govt. ought to be kept in view; but thought too much stress was laid on the rank of the States as political societies. There was a gradation, he observed from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty. He pointed out the limitations on the sovereignty of the States. as now confederated * * *. Under the proposed Govt. the powers of the States will be much farther reduced. According to the views of every member, the Genl. Govt. will have powers far beyond those exercised by the British Parliament when the States were part of the British Empire. It will in particular have the power, without the consent of the State Legislatures, to levy money directly on the people themselves; and therefore not to divest such *unequal* portions of the people as composed the several States, of an *equal* voice, would subject the system to the reproaches & evils which have resulted from the vicious representation in G.B.
>
> He entreated the gentlemen representing the small States to renounce a principle wch. was confessedly unjust, which cd. never be admitted, & if admitted must infuse mortality into a Constitution which we wished to last forever.

Yates reports concerning this speech that Madison said (*id.* at 472):

> If the power is not immediately derived from the people, in proportion to their numbers we may make a paper confederacy, but that will be all.

Alexander Hamilton likewise supported apportionment based solely on population (I Farrand 465–466):

> Mr. Hamilton observed that individuals forming political Societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States. In all of them some individuals are deprived of the right altogether, not having the requisite qualification of property. * * * In like manner States may modify their right of suffrage differently, the larger exercising a larger, the smaller a smaller share of it. But as States are a collection of individual men which ought we to respect most, the rights of the people composing them, or of the artificial beings resulting from the composition. Nothing could be more preposterous or absurd than to sacrifice the former to the latter. It has been sd. that if the smaller States renounce their *equality*, they renounce at the same time their *liberty*. The truth is it is a contest for power, not for liberty. Will the men composing the small States be less free than those composing the larger. The State of Delaware having 40,000 souls will *lose power*, if she has $\frac{1}{10}$ only of the votes allowed to Pa. having 400,000: but will the people of Del: *be less free*, if each citizen has an equal vote with each citizen of Pa. He admitted that common residence within the same State would produce a certain degree of attachment; and that this principle might have a certain influence in public affairs.. He thought however that this might by some precautions be in a great measure excluded: and that no material inconvenience could result from it, as there could not be any ground for combination among the States whose influence was most dreaded. * * * No considerable inconvenience had been found from the

> division of the State of N. York into different districts of different sizes.[11]

Yates gives this account of Hamilton's speech (*id.* at 473):

> The question, after all is, is it our interest in modifying this general government to sacrifice individual rights to the preservation of the rights of an *artificial* being, called states? There can be no truer principle than this—that every individual of the community at large has an equal right to the protection of government. If therefore three states contain a majority of the inhabitants of America, ought they to be governed by a minority? * * * [The larger States] are to surrender their rights—for what? for the preservation of an artificial being. We propose a free government—Can it be so if partial distinctions are maintained? * * * In the state of New York, five counties from a majority of representatives, and yet the government is in no danger, because the laws have a general operation. The small states exaggerate their danger, and on this ground contend for an undue proportion of power.

Elbridge Gerry of Massachusetts also agreed with Madison (I Farrand 467):

> [W]e never were independent States, were not such now, & never could be even on the principles of the Confederation. The States & the advocates for them were intoxicated with the idea of their *sovereignty*. He was a member of Congress at the time the federal articles were formed. The injustice of allowing each

[11] Both houses of the New York legislature were then apportioned on the basis of eligible voters. New York Constitution of 1777, Articles 4, 12.

> State an equal vote was long insisted on. He voted for it, but it was agst. his Judgment, and under the pressure of public danger, and the obstinacy of the lesser States.

Luther Martin replied to Gerry that (*id.* at 468):

> [T]he language of the States being *Sovereign & independent,* was once familiar & understood; though it seemed now so strange & obscure. He read those passages in the articles of Confederation which describe them in that language.

The convention rejected the motion of Robert Lansing to have the first branch elected on same basis as the Congress of the Confederation, *i.e.*, equal representation by States, by a vote of 6 to 4 with one State divided. By the converse vote, the convention adopted the resolution reported by the Committee of the Whole "that the rule of suffrage in the 1st branch ought not to be according to that established by the Articles of Confederation." (I Farrand 468.) Oliver Ellsworth of Connecticut then again proposed the compromise first suggested by Sherman (*id.* at 468–469):

> * * * that the rule of suffrage in the 2d. branch. be the same with that established by the articles of confederation". He was not sorry on the whole he said that the vote just passed, had determined against this rule in the first branch. He hoped it would become a ground of compromise with regard to the 2d. branch. We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle & would secure the large States agst. the small. An equality of voices was conformable to the federal principle and was necesary to secure the Small States agst. the large. He trusted that on this middle ground a compromise would take place. He did not see that it could on any

> other. * * * The existing confederation was founded on the equality of the States in the article of suffrage: was it meant to pay no regard to this antecedent plighted faith.

Abraham Baldwin of Georgia opposed Ellsworth's motion on the ground that the second house should represent property. (*Id.* at 469–470.) George Read of Delaware agreed in part with Madison and Hamilton (*id.* at 471):

> If [the government was to be] more national, I would be for a representation proportionate to population. [Yates]

James Wilson, on June 30th, strongly opposed Ellsworth's motion to allow each State an equal vote in the second branch. He rejected threats that convention would otherwise fail (I Farrand 482–484):

> If the minority of the people of America refuse to coalesce with the majority on just and proper principles, if a separation must take place, it could never happen on better grounds. The votes of yesterday agst. the just principle of representation, were as 22 to 90 of the people of America. Taking the opinions to be the same on this point, * * * the question will be shall less than ¼ of the U. States withdraw themselves from the Union, or shall more than ¾ renounce the inherent, indisputable, and unalienable rights of men, in favor of the artificial systems of States. If issue must be joined, it was on this point he would chuse to join it. The gentleman from Connecticut [Ellsworth] in supposing that the prepondenancy secured to the majority in the 1st. branch had removed the objections to an equality of votes in the 2d. branch for the security of the minority narrowed the case extremely. Such an equality will enable the minority to controul in all cases whatsoever, the sentiments and interests of the

majority. Seven States will controul six; seven States according to the estimates that had been used, composed 24/90 of the whole people. It would be in the power of less than 1/3 to overrule 2/3 whenever a question should happen to divide the States in that manner. Can we forget for whom we are forming a Government? Is it for *men*, or for the imaginary beings called States? Will our honest Constituents be satisfied with metaphysical distinctions? Will they, ought they to be satisfied with being told that one third, compose the greater number of States. The rule of suffrage ought on every principle to be the same in the 2d. as in the 1st. branch. * * * If the motion should be agreed to, we shall leave the U.S. fettered precisely as heretofore; with the additional mortification of seeing the good purposes of ye fair representation of the people in the 1st. branch, defeated in 2d. Twenty four will still controul sixty six.

Ellsworth replied that (*id.* at 484-485):

The capital objection of Mr. Wilson "that the minority will rule the majority" is not true. The power is given to the few to save them from being destroyed by the many. If an equality of votes had been given to them in both branches, the objection might have had weight. * * * No instance [of a confederacy][12] has existed in which an equality of voices has not been exercised by the members of it. We are running from one extreme to another. We are razing the foundations of the building. When we need only repair the roof. No salutary measure has been lost for want of *a majority of the States*, to favor it. If security be all that the great States wish for the 1st. branch secures them. * * * He appealed again to the

[12] Farrand has taken this phrase from the account of Yates. I Farrand 484, note 5.

> obligations of the federal pact which was still in force, and which had been entered into with so much solemnity, persuading himself that some regard would still be paid to the plighted faith under which each State small as well as great, held an equal right of suffrage in the General Councils.

Supporting Wilson, Madison said that speakers had urged (*id.* at 486):

> * * * continually that an equality of votes in the 2d. branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the 1st. branch was an effectual bulwark. But notwithstanding this apparent defence, the Majority of States might still injure the majority of people. 1. they could *obstruct* the wishes and interests of the majority. 2. they could *extort* measures, repugnant to the wishes & interest of the majority. 3. They could *impose* measures adverse thereto; as the 2d branch will probly exercise some great powers, in which the 1st will not participate.

William Richardson Davie of North Carolina agreed with Ellsworth, opposing the resolution approved by the Committee of the Whole (I Farrand 487–488):

> The Report of the Committee allowing the Legislatures to choose the Senate, and establishing a proportional representation in it, seemed to be impracticable. There will according to this rule be ninety members in the outset, and the number will increase as new States are added. It was impossible that so numerous a body could possess the activity and other qualities required in it. * * * [I]f a proportional representation was attended with insuperable difficulties, the making the Senate the Representative of the States, looked like bringing us back to Congs. again, and shutting out all the advan-

> tages expected from it. * * * He thought that in general there were extremes on both sides. We were partly federal, partly national in our Union. And he did not see why the Govt. might not in some respects operate on the States, in others on the people.

Attempting to meet Davie's objection, Wilson (*id.* at 488):

> * * * admitted the question concerning the number of Senators, to be embarrassing. If the smallest States be allowed one, and the others in proportion, the Senate will certainly be too numerous. He looked forward to the time when the smallest States will contain 100,000 souls at least. Let there be then one Senator in each for every 100,000 souls, and let the States not having that no. of inhabitants be allowed one. He was willing himself to submit to this temporary concession to the small States: and threw out the idea as a ground of compromise.

Benjamin Franklin then summarized the debate (I Farrand 488):

> The diversity of opinions turns on two points. If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges of planks do not fit the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition.

To resolve the impasse, he proposed the following resolution (*id.* at 489):

> That the Legislatures of the several States shall choose & send an equal number of Dele-

> gates, namely who are to compose the 2d. branch of the General Legislature—

However, while the resolution also gave each State an equal voice on several important issues involving the States such as issues affecting their sovereignty, voting strength was to be calculated by taxes paid with regard to appropriations bills. Benjamin Franklin explained that (*id.* at 499):

> Let the senate be elected by the states equally—in all acts of sovereignty and authority, let the votes be equally taken—the same in the appointment of all officers, and salaries; but in passing of laws, each state shall have a right of suffrage. in proportion to the sums they respectively contribute. [Yates]

Rufus King rejected all proposals for giving each State an equal vote and said that he was (I Farrand 489–490):

> filled with astonishment that if we were convinced that every *man* in America was secured in all his rights, we should be ready to sacrifice this substantial good to the phantom of *State* sovereignty: * * * that he could not therefore but repeat his amazement that when a just Govermt. founded on a fair representation of the *people* of America was within our reach, we should renounce the blessing, from an attachment to the ideal freedom & importance of *States:* that should this wonderful illusion continue to prevail, his mind was prepared for every event, rather than sit down under a Govt. founded in a vicious principle of representation and which must be as shortlived as it would be unjust. He might prevail on himself to accede to some such expedient as had been hinted by Mr. Wilson: but he never could listen to an equality of votes as proposed in the motion.

Also opposing both Ellsworth's and Franklin's compromises, Gunning Bedford of Delaware supported complete equality between the States (*id.* at 490–492):

> [T]here was no middle way between a perfect consolidation and a mere confederacy of the States. The first is out of the question, and in the latter they must continue if not perfectly, yet equally sovereign. * * * Look at G. Britain. Is the Representation there less unequal? But we shall be told again that that is the rotten part of the Constitution. Have not the boroughs however held fast their constitutional rights? and are we to act with greater purity than the rest of mankind. An exact proportion in the Representation is not preserved in any one of the States. Will it be said that an inequality of power will not result from an inequality of votes. Give the opportunity, and ambition will not fail to abuse it. * * * The little States are willing to observe their engagements, but will meet the large ones on no ground but that of the Confederation.

Yates says that Bedford stated (*id.* at 501–502):

> Let us then do what is in our power—*amend and enlarge the Confederation but not alter the Federal system.* [Emphasis in original.]

On July 1st, George Washington, the chairman of the convention, wrote David Stuart that (III Farrand 51):

> the primary cause of all our disorders lies in the different State Governments, and in the tenacity of that power which pervades the whole of their systems. Whilst independent sovereignty is so ardently contended for, whilst the local views of each State and seperate interests by which they are too much govern'd

> will not yield to a more enlarged scale of politicks * * *.

The convention voted on July 2, 1787, 5 to 5, with one State divided, on Ellsworth's motion to give each State one vote in the Senate. Connecticut, New York, New Jersey, Delaware, and Maryland voted for the resolution and Georgia was divided. I Farrand 510. While he said that "[e]quality of suffrage in the states is wrong" [Yates] (*id.* at 516), Charles Cotesworth Pinckney of South Carolina proposed that a committee be appointed of one member from each State to devise a compromise. Luther Martin did not object but warned that "no modifications whatever could reconcile the Smaller States to the least diminution of their equal Sovereignty." *Id.* at 511. Elbridge Gerry, who favored the population basis of apportionment, supported the committee because "[w]e must make concessions on both sides." *Id.* at 515. The convention approved the creation of the committee 9 States to 2.

On July 2, Phineas Bond wrote Lord Carmarthen that the problem was (III *id.* at 52–53):

> * * * to form such a federal constitution, as will give energy and consequence to the union. Whether this is to be done by improving the old governments or by substituting new ones—whether by continuing a power in each State to regulate its internal policy, or to abolish all separate establishments, and to form one grand federal authority, is a matter of consideration which creates much doubt and animadversion.

Yates gives the following account of the meeting of the newly formed Committee on Representation in the Legislature on July 3d (I Farrand 522):

> Many of the members, impressed with the utility of a general government, connected with it

> the indispensible necessity of a representation from the states *according to their numbers and wealth;* while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal,* or in other words, *equality of suffrage.*

The committee agreed to a motion by Benjamin Franklin providing that one representative shall be apportioned in the first branch for each 40,000 people with a minimum of one for each State; that all bills for raising or apportioning money must arise in that house and may not be amended by the second branch; and that each State shall have an equal vote in the second house. *Id.* at 523.

On July 5th, the convention debated the committee's report. Madison continued to oppose any compromise deviating from apportionment based on population (I Farrand 527–528):

> He conceived that the Convention was reduced to the alternative of either departing from justice in order to conciliate the smaller States, and the minority of the people of the U.S. or of displeasing these by justly gratifying the larger States and the majority of the people. He could not himself hesitate as to the option he ought to make. The Convention with justice & the majority of the people on their side, had nothing to fear. With injustice and the minority on their side they had every thing to fear. It was in vain to purchase concord in the Convention on terms which would perpetuate discord among their Constituents. The Convention ought to pursue a plan which would bear the test of examination, which would be espoused & supported by the enlightened and impartial part of America, & which they could themselves vindicate & urge.

Yates' report of this speech states (*id.* at 535):

> We are driven to an unhappy dilemma. Two thirds of the inhabitants of the union are to please the remaining one third by sacrificing their essential rights.

Pierce Butler of South Carolina agreed that (*id.* at 529):

> * * * he could not let down his idea of the people. of America so far as to believe they, would from mere respect to the Convention adopt a plan evidently unjust. * * * He urged that the 2d. branch ought to represent the States according to their property.

In contrast, Elbridge Gerry supported the compromise (*id.* at 532):

> We were however in a peculiar situation. We were neither the same Nation nor different Nations. We ought not therefore to pursue the one or the other of these ideas too closely. If no compromise should take place what will be the consequence. A secession he foresaw would take place; for some gentlemen seem decided on it; two different plans will be proposed, and the result no man could foresee. If we do not come to some agreement among ourselves some foreign sword will probably do the work for us.

George Mason likewise said that (*id.* at 533):

> There must be some accomodation on this point, or we shall make little further progress in the work. Accomodation was the object of the House in the appointment of the Committee; and of the Committee in the Report they had made. And however liable the Report might be to objections, he thought it preferable to an appeal to the world by the different sides, as had been talked of by some Gentlemen.

The convention then turned in particular to the first clause of the resolution which stated that one representative shall be apportioned to every 40,000 people. Gouverneur Morris of Pennsylvania objected to this provision both because it was based on population rather than wealth and because the Atlantic Coast states could be out-voted in the future (I Farrand 533–534):

> He thought property ought to be taken into the estimate as well as the number of inhabitants. Life and liberty were generally said to be of more value, than property. An accurate view of the matter would nevertheless prove that property was the main object of Society. * * * He thought the rule of representation ought to be so fixed as to secure to the Atlantic States a prevalence in the National Councils. The new States will know less of the public interest than these, will have an interest in many respects different, in particular will be little scrupulous of involving the Community in wars the burdens & operations of which would fall chiefly on the maritime States. Provision ought therefore to be made to prevent the maritime States from being hereafter outvoted by them. He thought this might be easily done by irrevocably fixing the number of representatives which the Atlantic States should respectively have, and the number which each new State will have. This wd. not be unjust, as the western settlers wd. previously know the conditions on which they were to possess their lands.[13]

Agreeing, John Rutledge of South Carolina said that (*id.* at 534):

> The gentleman last up had spoken some of his sentiments precisely. Property was cer-

[13] The fear that the western States would ultimately control the legislature was expressed repeatedly during the convention but no limit was ultimately placed on the representation of new States in either house.

> tainly the principal object of Society. If numbers should be made the (rule of representation, the Atlantic States will be subjected to the Western. He moved that the first proposition in the report be postponed in order to take up the following viz. "that the suffrages of the several States be regulated and proportioned according to the sums to be paid towards the general revenue by the inhabitants of each State respectively * * *.

Rutledge's motion was rejected with only South Carolina supporting it.

On July 6th Gouverneur Morris (I Farrand 540):

> * * * moved to commit [back to the committee] so much of the Report as relates to "1 member for every 40,000 inhabitants": His view was that they might absolutely fix the number for each State in the first instance; leaving the Legislature at liberty to provide for changes in the relative importance of the States, and for the case of new States.

This view was opposed by Nathaniel Gorham of Massachusetts who (*ibid.*):

> * * * apprehended great inconveniency from fixing directly the number of Representatives to be allowed to each State. He thought the number of Inhabitants the true guide; tho' perhaps some departure might be expedient from the full proportion.

Elbridge Gerry (*id.* at 541):

> * * * favored the Commitment and thought that Representation ought to be in the Combined ratio of numbers of Inhabitants and of wealth, and not of either singly.

Agreeing with Gorham "that the Ratio of Representation proposed could not be safely fixed, since in a century & a half our computed increase of population

would carry the number of representatives to an enormous excess," Rufus King said that wealth not population should be the basis of apportionment (I Farrand 541):

> * * * ye. number of inhabitants was not the proper index of ability & wealth; that property was the primary object of Society; and that in fixing a ratio this ought not to be excluded from the estimate. With regard to New States, he observed that there was something peculiar in the business which had not been noticed. The U.S. were now admitted to be proprietors of the Country, N. West of. the Ohio. Congs. by one of their ordinances have impoliticly laid it out into ten States, and have made it a fundamental article of compact with those who may become settlers, that as soon as the number in any one State shall equal that of the smallest of the 13 original States, it may claim admission into the Union. Delaware does not contain it is computed more than 35,000 souls, and for obvious reasons will not increase much for a considerable time. It is possible then that if this plan be persisted in by Congs. 10 new votes may be added, without a greater addition of inhabitants than are represented by the single vote of Pena.

Pierce Butler of South Carolina also supported wealth as the proper standard (*id.* at 541–542):

> He was persuaded that the more the subject was examined, the less it would appear that the number of inhabitants would be a proper rule of proportion. If there were no other objection the changeableness of the standard would be sufficient. He concurred with those who thought some balance was necessary between the old & New States. He contended strenuously that property was the only just measure of representation. This was the great object of Governt: the great cause of war, the great means of carrying it on.

On the other hand, Charles Pinckney (*id.* at 542):

> * * * saw no good reason for committing. The value of land had been found on full investigation to be an impracticable rule. The contributions of revenue including imports & exports, must be too changeable in their amount; too difficult to be adjusted; and too injurious to the noncommercial States. The number of inhabitants appeared to him the only just & practicable rule.

William Richardson Davie of North Carolina proposed a compromise between population and state equality (*ibid.*):

> He seemed to think that wealth or property ought to be represented in the 2d. branch; and numbers in the 1st. branch.

The convention voted 7 States to 3, with one State divided, to refer the first sentence of the resolution of the Committee on Representation in the Legislature to a new five-man special committee. The clause requiring appropriation and tax bills to originate in the first branch was passed 5 to 3 with 3 States divided. I Farrand 538–539. James Wilson then (id. at 542):

> * * * signified that his views in agreeing to the Commitmt. was that the Come might consider the propriety of adopting a scale similar to that established by the Constitution of Masts. [see p. 18, note 9 above] which wd give an advantage to ye. small States without substantially departing from a rule of proportion.

After debate began on the clause of the committee's report concerning the origination of tax and appropriation bills, George Mason said (*id.* at 544):

> He was a friend to proportional representation in both branches; but supposed that some points must be yielded for the sake of accommodation.

When debate began on July 7th, Elbridge Gerry said that the issue of representation was (I Farrand 550):

> * * * the critical question. He had rather agree to it than have no accommodation. A Governt. short of a proper national plan if generally acceptable, would be preferable to a proper one which if it could be carried at all, would operate on discontented States.

The convention then approved the committee resolution giving each State an equal vote in the second house 6 States to 3 (Pennsylvania, South Carolina, and Virginia), with two States divided. After debate was renewed, William Paterson, who introduced the New Jersey plan, said that he (*id.* at 551):

> * * * considered the mode & rule of representation in the 1st. branch as [a concession] and that after the establishment of that point, the small States would never be able to defend themselves without an equality of votes in the 2d. branch. There was no other ground of accomodation. His resolution was fixt. He would meet the large States on that Ground and no other. For himself he should vote agst. the Report, because it yielded too much [the origination of appropriations and revenue bills in the 1st house].

Gouverneur Morris was also opposed to the report but for entirely different reasons (I Farrand 551-552):

> He was agst. the Report because it maintained the improper Constitution of the 2d. branch. It made it another Congress, a mere whisp of straw. It had been sd. (by Mr. Gerry) that the new Governt. would be partly national, partly federal; that it ought in the first quality to protect individuals; in the second, the States. But in what quality was it to protect the aggregate interest of the whole. Among the many

> provisions which had been urged, he had seen none for supporting the dignity and splendor of the American Empire. It had been one of our greatest misfortunes that the great objects of the nation had been sacrificed constantly to local views; in like manner as the general interests of States had been sacrificed to those of the Counties. * * * They were originally nothing more than colonial corporations. On the declaration of Independence, a Governmt. was to be formed. The small States aware of the necessity of preventing anarchy, and taking advantage of the moment, extorted from the large ones an equality of votes. Standing now on that ground, they demand under the new system greater rights as men, than their fellow Citizens of the large States. The proper answer to them is that the same necessity of which they formerly took advantage does not now exist, and that the large States are at liberty now to consider what is right, rather than what may be expedient.

James Madison agreed with Morris (*id.* at 554):

> An Equality of votes in ye. Senate will enable a *minority* to hold the Majority—they will compel the majority to submit to ther particular Interest or they will withhold their Assent to essential & necessary measures * * *. [King]

The report of the special committee on July 9th proposed that the number of representatives in the first branch be specified in the constitution, but that the legislature could change this apportionment "upon the principles of * * * wealth and number of inhabitants." I Farrand 558. Roger Sherman inquired (*id.* at 559):

> * * * on what principles or calculations the Report was founded. It did not appear to

> correspond with any rule of numbers, or of any requisition hitherto adopted by Congs.

Nathaniel Gorham responded that (*id.* at 559–560):

> The number of blacks & whites with some regard to supposed wealth was the general guide. Fractions could not be observed. The Legislre. is to make alterations from time to time as justice & propriety may require. Two objections prevailed agst the rate of 1 member for every 40,000 inhts. The 1st. was that the Representation would soon be too numerous: the 2d. that the Westn. States who may have a different interest, might if admitted on that principle by degrees, out-vote the Atlantic. Both these objections are removed. The number will be small in the first instance and may be continued so, and the Atlantic States having ye. Govt. in their own hands, may take care of their own interest, by dealing out the right of Representation in safe proportions to the Western States.

The convention then approved 9 States to 2 (New York and New Jersey opposing) the clause allowing the legislature to apportion in the future on the basis of wealth and inhabitants. *Id.* at 560.

Debate started on a motion to refer the first clause of the report concerning the initial apportionment to a committee with one member from each State. I Farrand 560. Hugh Williamson again expressed fear of the new, western States (*ibid.*):

> Mr. Williamson. thought it would be necessary to return to the rule of numbers. but that the Western States stood on different footing. If their property shall be rated as high as that of the Atlantic States, then their representation ought to hold a like proportion. Otherwise if their property was not to be equally rated.

In trying to explain the basis on which the committee based the first apportionment, Gouverneur Morris said (*id.* at 560–561):

> The Report is little more than a guess. Wealth was not altogether disregarded by the Come. Where it was apparently in favor of one State whose nos. were superior to the numbers of another, by a fraction only, a member extraordinary was allowed to the former: and so vice versa.

George Read of Delaware (*id.* at 561):

> * * * asked why Georgia was allowed 2 members, when her number of inhabitants had stood below that of Delaware.

Defending the apportionment, Gouverneur Morris replied (*ibid.*):

> Such is the rapidity of the population of that State, that before the plan takes effect, it will probably be enitled to 2 Representatives.

Governor Edmund Randolph of Virginia said that he disliked the committee report (I Farrand 561):

> He was apprehensive that as the number was not to be changed till the Natl. Legislature should please, a pretext would never be wanting to postpone alterations, and keep the power in the hands of those possessed of it. He was in favor of the commitmt. to a member from each State.

William Paterson, although the originator of the small-state plan, objected to the report in terms suggesting his appreciation of the importance of a population standard for apportioning one house (*ibid.*):

> Mr. Patterson considered the proposed estimate for the future according to the Combined rule of numbers and wealth, as too vague. For this reason N. Jersey was agst. it. He could

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> regard negroes slaves in no light but as property. They are no free agents, have no personal liberty, no faculty of acquiring property, but on the contrary are themselves property, & like other property entirely at the will of the Master. Has a man in Virga. a number of votes in proportion to the number of his slaves? and if Negroes are not represented in the States to which they belong, why should they be represented in the Genl. Govt. What is the true principle of Representation? It is an expedient by which an assembly of certain individls. chosen by the people is substituted in place of the inconvenient meeting of the people themselves.

Seeing the anomaly of Paterson's position, Madison pointed out (*id.* at 562):

> * * * that his doctrine of Representation which was in its principle the genuine one, must for ever silence the pretensions of the small States to an equality of votes with the large ones. They ought to vote in the same proportion in which their citizens would do, if the people of all the States were collectively met. He suggested as a proper ground of compromise, that in the first branch the States should be represented according to their number of free inhabitants: And in the 2d. which had for one of its primary objects the guardianship of property, according to the whole number, including slaves.

The convention approved 9 States to 2 referring the first clause of the report to a new committee. *Ibid.*

The next day, July 10th, Edmund Randolph submitted a plan to conciliate the small States on the issue of the apportionment of the second branch. He proposed that the vote in the second branch be by States with each State counting equally on certain issues such as navigation of rivers and regulating coin

while "in all other cases the right of suffrage be proportioned according to an equitable rule of representation." III Farrand 56. Also, on July 10th, the committee on representation reported a proposal for a new initial apportionment of the 1st house, this time having 65 members instead of the former 56. I *id.* at 563. John Rutledge of South Carolina made a motion that New Hampshire "be reduced from 3 to 2 members" on the ground that "[h]er numbers did not entitle her to 3 and it was a poor State." *Id.* at 566. In reply, Rufus King stated (*ibid.*):

> N. Hamshire has probably more than 120,000 Inhabts. and has an extensive country of tolerable fertility. Its inhabts therefore may be expected to increase fast. He remarked that the four Eastern States having 800,000 souls, have 1/3 fewer representatives than the four Southern States, having not more than 700,000 souls rating the blacks, as 5 for 3. The Eastern peo- will advert to these circumstances, and be dissatisfied. He believed them to be very desirous of uniting with their Southern brethren but did not think it prudent to rely so far on that disposition as to subject them to any gross inequality.

After the amendments proposed by Rutledge and others were rejected, the convention approved the committee's apportionment 9 States to 2. *Id.* at 570.

Governor Randolph then proposed an amendment (I Farrand 570–571):

> that in order to ascertain the alterations in the population & wealth of the several States the Legislature should be required to cause a census, and estimate to be taken within one year after its first meeting; and every [illegible] years thereafter—and that the Legislre. arrange the Representation accordingly.

The amendment was opposed by Gouverneur Morris on the ground that it fettered (*id.* at 571):

> * * * the Legislature too much. * * * He dwelt much on the danger of throwing such a preponderancy into the western Scale, suggesting that in time the Western people wd. outnumber the Atlantic States. He wished therefore to put it in the power of the latter to keep a majority of votes in their own hands. It was objected he said that if the Legislre. are left at liberty, they will never readjust the Representation. He admitted that this was possible, but he did not think it probable unless the reasons agst. a revision of it were very urgent & in this case, it ought not to be done.

Debate resumed on Randolph's proposal on July 11th. George Mason both rejected fears of western control and argued for a clear standard of apportionment based on population (I Farrand 578–579):

> The greater the difficulty we find in fixing a proper rule of Representation, the more unwilling ought we to be, to throw the task from ourselves, on the Genl. Legislre. He did not object to the conjectural ratio which was to prevail in the outset; but considered a Revision from time to time according to some permanent & precise standard as essential to ye. fair representation required in the 1st. branch. According to the present population of America, the Northn. part of it had a right to preponderate, and he could not deny it. But he wished it not to preponderate hereafter when the reason no longer continued. From the nature of man we may be sure, that those who have power in their hands will not give it up while they can retain it. On the Contrary we know they will always when they can rather increase it. If the S. States therefore should have ¾ of the people of America within their limits, the Northern will

> hold fast the majority of Representatives. ¼ will govern the ¾. The S. States will complain: but they may complain from generation to generation without redress. Unless some principle therefore which will do justice to them hereafter shall be inserted in the Constitution, disagreeable as the declaration was to him, he must declare he could neither vote for the system here nor support it, in his State. Strong objections had been drawn from the danger to the Atlantic interests from new Western States. Ought we to sacrifice what we know to be right in itself, lest it should prove favorable to States which are not yet in existence. If the Western States are to be admitted into the Union as they arise, they must, he wd. repeat, be treated as equals, and subjected to no degrading discriminations. * * * He urged that numbers of inhabitants: though not always a precise standard of wealth was sufficiently so for every substantial purpose.

Hugh Williamson of North Carolina proposed a substitute to Randolph's resolution (*id.* at 579):

> "that in order to ascertain the alternations that may happen in the population & wealth of the several States, a census shall be taken of the free white inhabitants and 4/5ths of those of other descriptions on the 1st year after this Government shall have been adopted and every year thereafter; and that the Representation be regulated accordingly."

After agreeing to the substitution, Randolph (*id.* at 579–580):

> * * * observed that the ratio fixt for the 1st. [legislature] was a mere conjecture, that it placed the power in the hands of that part of America, which could not always be entitled to it, that this power would not be voluntarily renounced; and that it was consequently the duty of the Convention to secure its renunciation

> when justice might so require; by some constitutional provisions. If equality between great & small States be inadmissible, because in that case unequal numbers of Constituents wd. be represented by equal numbers of votes; was it not equally inadmissible that a larger & more populous district of America should hereafter have less representation, than a smaller & less populous district. If a fair representation of the people be not secured, the injustice of the Govt. will shake it to its foundations. What relates to suffrage is justly stated by the celebrated Montesquieu, as a fundamental article in Republican Govts.

John Rutledge then repeated his contention that wealth should be considered in apportionment (*id.* at 582):

> Mr. Rutlidge [sic] contended for the admission of wealth in the estimate by which Representation should be regulated. The Western States will not be able to contribute in proportion to their numbers, they shd. not therefore be represented in that proportion. The Atlantic States will not concur in such a plan. He moved that "at the end of years after the 1st. meeting of the Legislature, and of every years thereafter, the Legislature shall proportion the Representation according to the principles of wealth & population"

Roger Sherman opposed considering wealth (*ibid.*):

> Mr. Sherman thought the number of people alone the best rule for measuring wealth as well as representation; and that if the Legislature were to be governed by wealth, they would be obliged to estimate it by numbers.

Returning to his fear of the West, Gouverneur Morris argued much like those who now claim that rural areas are entitled to no representation because rural

people are better at running a government (I Farrand 583):

> The Busy haunts of men not the remote wilderness, was the proper School of political Talents. If the Western people get the power into their hands they will ruin the Atlantic interests. The Back members are always most averse to the best measures. He mentioned the case of Pena. formerly. The lower part of the State had ye. power in the first instance. They kept it in yr. own hands. & the country was ye. better for it.[14]

Madison opposed any proposals designed to limit western representation (*id.* at 584–585):

> The case of Pena. had been mentioned where it was admitted that those who were possessed of the power in the original settlement, never admitted the new settlmts. to a due share of it. England was a still more striking example. The power there had long been in the hands of the boroughs, of the minority; who had opposed & defeated every reform which had peen attempted. Virga. was in a lesser degree another example. With regard to the Western States, he was clear & firm in opinion that no unfavorable distinctions were admissible either in point of justice or policy. * * * He could not agree that any substantial objection lay agst. fixig numbers for the perpetual standard of Representation. It was said that Representation & taxation were to go together; that taxation & wealth ought to go together, that population and wealth were not measures of each other. He ad-

[14] While Morris praised Pennsylvania for preventing the newly settled area from attaining power through malapportionment, it is significant that the convention rejected his view that a similar result should be attained by placing in the Constitution a limitation on the representation of new States.

> mitted that in different climates, under different forms of Govt. and in different stages of civilization the inference was perfectly just. He would admit that in no situation numbers of inhabitants were an accurate measure of wealth. He contended however that in the U. States it was sufficiently so for the object in contemplation.

George Mason supported the requirement of periodical reapportionment. He (*id.* at 586):

> * * * Agreed with Mr. Govr. Morris that we ought to leave the interests of the people to the Representatives of the people: but the objection was that the Legislature would cease to be the Representatives of the people. It would continue so no longer than the States now containing a majority of the people should retain that majority. As soon as the Southern & Western population should predominate, which must happen in a few years, the power wd be in the hands of the minority, and would never be yielded to the majority, unless provided for by the Constitution.

The convention adopted 6 States to 4 Williamson's proposal of a census for free inhabitants. *Ibid.* Subsequently, Williamson's entire resolution, however, was rejected 9 to 0 as different States opposed it for different reasons. *Id.* at 588.

On July 12, 1787, the convention debated a proposal to make taxation proportional to representation and to base representation on inhabitants and wealth. William Samuel Johnson of Connecticut contended (I Farrand 593):

> * * * that wealth and population were the true, equitable rule of representation; but he conceived that these two principles resolved themselves into one; population being the best measure of wealth.

On the other hand, Rufus King replied that (*id.* at 595):

> * * * he had still two powerful objections agst. tying down the Legislature to the rule of numbers. 1. they were at this time an uncertain index of the relative wealth of the States. 2. if they were a just index at this time it can not be supposed always to continue so.

Charles Pinckney then proposed that slaves be equal to whites in ascertaining representation (*id.* at 596):

> This he urged was nothing more than justice. The blacks are the labourers, the peasants of the Southern States: they are as productive of pecuniary resources as those of the Northern States. They add equally to the wealth, and considering money as the sinew of war, to the strength of the nation.

The convention adopted a resolution basing both direct taxation and representation on whites and 3/5 of the slaves and requiring a census within six years and subsequently every ten years. *Id.* at 597.

Edmund Randolph proposed on July 13th that the resolution passed on July 9th providing for the future apportionment of representatives on the basis of wealth and numbers be reconsidered. I Farrand 603. He submitted a resolution deleting the reference to wealth. During the debate on this resolution James Wilson strongly supported apportionment on the basis of population (*id.* at 605–606):

> Conceiving that all men wherever placed have equal rights and are equally entitled to confidence, he viewed without apprehension the period when a few States should contain the superior number of people. The majority of people wherever found ought in all questions to govern the minority. If the interior Country should acquire this majority they will not only have the right, but will avail themselves

of it whether we will or no. This jealousy misled the policy of G. Britain with regard to America. The fatal maxims espoused by her were that the Colonies were growing too fast, and that their growth must be stinted in time. What were the consequences? first: enmity on our part, then actual separation. Like consequences will result on the part of the interior settlements, if like jealousy & policy be pursued on ours. Further. if numbers be not a proper rule, why is not some better rule pointed out. No one has yet ventured to attempt it. Congs. have never been able to discover a better. No State as far as he had heard, has suggested any other. In 1783, after elaborate discussion of a measure of wealth all were satisfied then as they are now that the rule of numbers, does not differ much from the combined rule of numbers & wealth. Again he could not agree that property was the sole or the primary object of Governt. & Society. The cultivation & improvement of the human mind was the most noble object. With respect to this object, as well as to other *personal rights*, numbers were surely the natural & precise measure of Representation. And with respect to property, they could not vary much from the precise measure. In no point of view however could the establishmt. of numbers as the rule of representation in the 1st. branch vary his opinion as to the impropriety of letting a vicious principle into the 2d. branch.

Randolph's resolution passed 9 States to 0 with Delaware divided. *Id.* at 606.

On July 14th, Elbridge Gerry offered, and Rufus King seconded, the following resolution (II Farrand 3):

> that in order to secure the liberties of the States already confederated, the number of Representatives in the 1st branch of the States which shall hereafter be established shall never exceed

> in number, the Representatives from such of the States as shall accede to this confederation.

Gerry explained that he apprehended dangers from the western states. He was for admitting them (*ibid.*):

> * * * on liberal terms, but not for putting ourselves into their hands. They will if they acquire power like all men, abuse it. They will oppress commerce, and drain our wealth into the Western Country. To guard agst. these consequences, he thought it necessary to limit the number of new States to be admitted into the Union, in such a manner, that they should never be able to outnumber the Atlantic States.

Roger Sherman opposed the resolution (*ibid.*):

> We are providing for our posterity, for our children and our grand Children, who would be as likely to be citizens of new Western States, as of the old States. On this consideration alone, we ought to make no such discrimination as was proposed by the motion.

Gerry replied that (*ibid.*):

> There was a rage for emigration from the Eastern States to the Western Country and he did not wish those remaining behind to be at the mercy of the Emigrants. Besides foreigners are resorting to that Country, and it is uncertain what turn things may take there.

The proposal was rejected 5 to 4 with one State divided.

John Rutledge then proposed reconsideration of the resolution previously adopted giving equality of representation in the Senate and requiring money bills to originate in the first branch. II Farrand 3. Supporting reconsideration, James Wilson stressed (*id.* at 4):

> * * * when on the question concerning an equality of votes, the House was divided, our Constituents had they voted as their representatives did, would have stood as 2/3 agst. the equality,

> and ⅓ only in favor of it. This fact would ere long be known, and it will appear that this fundamental point has been carried by ⅓ agst. ⅔. What hopes will our constituents entertain when they find that the essential principles of justice have been violated in the outset of the Government: As to the privilege of originating money bills, it was not considered by any as of much moment, and by many as improper in itself. He hoped both clauses would be reconsidered. The equality of votes was a point of such critical importance, that every opportunity ought to be allowed, for discussing and collecting the mind of the Convention on it.

Luther Martin restated the threats he had invoked earlier in the convention (*ibid.*):

> He had rather there should be two Confederacies, than one founded on any other principle than an equality of votes in the 2d branch at least.

Charles Pinckney then moved (*id.* at 5):

> * * * that instead of an equality of votes the States should be represented in the 2d branch as follows: N.H. by 2 members, Mas 4. R.I. 1. Cont. 3. N.Y. 3. N.J. 2. Pa. 4. Del. 1. Md. 3. Virga. 5. N.C. 3. S.C. 3. Geo. 2. making in the whole 36.

James Madison supported the motion "as a reasonable compromise." *Ibid.*

Rufus King continued to demand apportionment based on population in both houses. He (II Farrand 6–7):

> * * * considered the proposed Government as substantially and formally, a General and National Government over the people of America. There never will be a case in which it will act as a federal Government on the States and not on

> the individual Citizens. And is it not a clear principle that in a free Govt. those who are to be the objects of a Govt. ought to influence the operations of it? What reason can be assigned why the same rule of representation sd. not prevail in the 2d branch as in the 1st? He could conceive none. On the contrary, every view of the subject that presented itself, seemed to require it. * * * [I]n N. York he had seen that the most powerful argument used by the considerate opponents to the grant of the Impost to Congress, was pointed agst. the viccious constitution of Congs. with regard to representation & suffrage. He was sure that no Govt. could last that was not founded on just principles. He preferred the doing of nothing, to an allowance of an equal vote to all the States. It would be better he thought to submit to a little more confusion & convulsion, than to submit to such an evil.

On the other hand, Caleb Strong of Massachusetts supported the compromise in the committee report rather than Pinckney's resolution (*id.* at 7–8):

> The Convention had been much divided in opinion. In order to avoid the consequences of it, an accomodation had been proposed. A Committee had been appointed; and though some of the members of it were averse to an equality of votes, a Report has been made in favor of it. It is agreed on all hands that Congress are nearly at an end. If no Accommodation takes place, the Union itself must soon be dissolved. * * * He thought the small States had made a considerable concession in the article of money bills, and that they might naturally expect some concessions on the other side. From this view of the matter he was compelled to give his vote for the Report taken all together.

James Madison (II Farrand 8–9):

> * * * expressed his apprehensions that if the proper foundation of Government was destroyed, by substituting an equality in place of a proportional Representation, no proper superstructure would be raised. * * * He reminded [the small States] of the consequences of laying the existing confederation on improper principles. * * * It had been very properly observed by Mr. Patterson [sic] that Representation was an expedient by which the meeting of the people themselves was rendered unnecessary; and that the representatives ought therefore to bear a proportion to the votes which their constituents if convened, would respectively have. Was not this remark as applicable to one branch of the Representation as to the other? But it had been said that the Governt. would in its operation be partly federal, partly national; that altho' in the latter respect the Representatives of the people ought to be in proportion to the people: yet in the former it ought to be according to the number of States. If there was any solidity in this distinction he was ready to abide by it, if there was none it ought to be abandoned. In all cases where the Genl. Governt. is to act on the people, let the people be represented and the votes be proportional. In all cases where the Governt. is to act on the States as such, in like manner as Congs. now act on them, let the States be represented & the votes be equal. This was the true ground of compromise if there was any ground at all. But he denied that there was any ground. He called for a single instance in which the Genl. Govt. was not to operate on the people individually. The practicability of making laws, with coercive sanctions, for the States as political bodies, had been exploded on all hands. * * *

> He enumerated the objections agst. an equality of votes in the 2d branch, notwithstanding the proportional representation in the first; 1. the minority could negative the will of the majority of the people. 2. they could extort measures by making them a condition of their assent to other necessary measures. 3. they could obtrude measures on the majority by virtue of the peculiar powers which would be vested in the Senate. 4. the evil instead of being cured by time, would increase with every new State that should be admitted, as they must all be admitted on the principle of equality. 5. the perpetuity it would give to the preponderance of the Northn. agst. the Southn. Scale was a serious consideration.

James Wilson agreed with Madison (*id.* at 10):

> A vice in the Representation, like an error in the first concoction, must be followed by disease, convulsions, and finally death itself. The justice of the general principle of proportional representation has not in argument at least been yet contradicted.

Pinckney's motion was rejected 6 to 4 with Pennsylvania, Maryland, Virginia, and South Carolina in the minority. *Id.* at 11.

On July 16, 1787, the convention passed, 5 States to 4 (Pennsylvania, Virginia, South Carolina, and Georgia), with Massachusetts divided, a report from a committee providing for equality of representation among the States in the Senate. II Farrand 15. Edmund Randolph then proposed adjournment to allow "some conciliatory experiment" to be devised. *Id.* at 18. However, James Patterson stated that (*ibid.*):

> No conciliation could be admissible on the part of the smaller States on any other ground than that of an equality of votes in the 2d. branch.

Madison reports a meeting of the larger States the following day, July 17th (II Farrand 19–20):

> * * * for the purpose of consulting on the proper steps to be taken in consequence of the vote in favor of an equal Representation in the 2d. branch, and the apparent inflexibility of the smaller States on that point—Several members from the latter States also attended. * * * It appeared indeed that the opinions of the members who disliked the equality of votes differed so much as to the importance of that point, and as to the policy of risking a failure of any general act of the Convention by inflexibly opposing it. Several of them supposing that no good Governmt. could or would be built on that foundation, and that as a division of the Convention into two opinions was unavoidable it would be better that the side comprising the principal States, and a majority of the people of America, should propose a scheme of Govt. to the States, than that a scheme should be proposed on the other side, would have concurred in a firm opposition to the smaller States, and in a separate recommendation, if eventually necessary. Others seemed inclined to yield to the smaller States, and to concur in such an Act however imperfect & exceptionable, as might be agreed on by the Convention as a body, tho' decided by a bare majority of States and by a minority of the people of the U. States. It is probable that the result of this consultation satisfied the smaller States that they had nothing to apprehend from a Union of the larger, in any plan whatever agst. the equality of votes in the 2d. branch.

This finally settled the issue of representation in Congress, an issue on which the convention had nearly floundered.

Alexander Martin, a delegate from North Carolina, wrote Governor Caswell on July 24th that "it is no small task to bring to a conclusion the great objects

of a United Government viewed in different points by thirteen Independent Sovereignties; United America must have one general Interest to be a Nation, at the same time preserving the particular Interest of the Individual States." III Farrand 64–65. A few days later on August 1st, Pierce Butler of South Carolina wrote that the purpose of the convention was "to form a stronger Constitution on strict Foederal Principles, for the Governmt. of the whole * * *." *Id.* at 67.

On August 8th, during debate on the residence requirement for election to the House of Representatives, Gouverneur Morris favored no such requirement, but only a freehold. "Such a regulation is not necessary. People rarely chuse a nonresident—It is improper as in the 1st. branch; *the people at large,* not the *States* are represented" (emphasis in original). II Farrand 217. That same day, the report of the Committee on Detail amended without debate or objection the section concerning the apportionment of the 1st branch so as to provide "that each State shall have one representative at least." *Id.* at 222.

The next day, in discussing a provision that Congress has the power to regulate Congressional elections, James Madison implied clearly his view that apportionment of state legislatures on some basis other than population was unfair and that a provision was necessary in the new constitution to prevent the persons, who as a result of malapportionment, controlled state government from running Congressional elections to serve their own interests (*id.* at 241):

> Besides, the inequality of the Representation in the Legislatures of particular States, would produce a like inequality in their representation in the Natl. Legislature, as it was presum-

> able that the Counties having the power in the former case would secure it to themselves in the latter.

On August 13th, George Mason supported the proposal that revenue bills must originate in House of Representatives and cannot be modified in Senate on the ground that (II Farrand 273–274):

> 1. The Senate did not represent the *people*, but the *States* in their political character. It was improper therefore that it should tax the people. * * * The House of Lords does not represent nor tax the people, because not elected by the people. * * * the pursestrings should be in the hands of the Representatives of the people.

Likewise on August 23d, James Madison, in the debate on the Senate's power as to treaties, said that "the Senate represented the States alone. * * *." II Farrand 392. During debate on August 30 on the power of the new government to admit new States, Luther Martin opposed a provision to allow the division of existing States only with the permission of those States. He suggested as the reason for his position that a minority of the States might control the newly settled areas through malapportionment (*id.* at 463):

> * * * Martin, urged the unreasonableness of forcing & guaranteeing the people of Virginia beyond the Mountains, the Western people, of N. Carolina. & of Georgia, & the people of Maine, to continue under the States now governing them, without the consent of those States to their separation. Even if they should become the *majority*, the majority of *Counties*, as in Virginia may still hold fast the dominion over them.

Much of the opposition on September 8th to the proposal that treaties must be ratified by two thirds of the Senate arose from the fact that a minority of the people will elect a majority of the Senators. Hugh Williamson of North Carolina (II Farrand 548):

> * * * remarked that Treaties are to be made in the branch of the Govt. where there may be a majority of the States without a majority of the people. Eight men may be a majority of a quorum, & should not have the power to decide the conditions of peace.

Elbridge Gerry similarly stressed (*ibid.*):

> * * * the danger of putting the essential rights of the Union in the hands of so small a number as a majority of the Senate, representing perhaps, not one fifth of the people.

On September 17, 1787, the Convention transmitted the proposed constitution to the Congress of the Confederation. II Farrand 665. The resolution stated that the Constitution should afterwards be submitted to a convention of delegates in each State for ratification. *Ibid.* After ratification by the conventions of nine States, the resolution stated that the Congress of the Confederation shall set a day and place for the election of President under the new constitution by the electors chosen in the various States. The letter accompanying both the proposed constitution and the resolution to the Congress of the Confederation stated that "[i]t is obviously impracticable in the federal government of these States, to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all—Individuals entering into society, must give up a share of liberty to preserve the rest." *Id.* at 666. On the other hand, the letter stated that the basic object of the convention was "the consolidation of our Union." *Id.* at 667.

The transmission of the proposed Constitution to the Congress of the existing Confederation, together with the language of the accompanying letter, demonstrate that the Constitution was viewed as a substantial modification to the Confederation in order to give greater power to the federal government at the expense of the independence of the States while at the same time not totally discarding the existing system by creating a national system in which state sovereignty was ended.

b. The Federalist Papers.—In Number 22 of the Federalist Papers, which was published on December 14, 1787, Alexander Hamilton attacked at some length equality of representation by States in the Continental Congress in his enumeration of the evils and weaknesses of the Confederation (*The Federalist* (Cooke ed., 1961),[15] pp. 138–139):

> The right of equal suffrage among the States is another exceptionable part of the confederation. Every idea of proportion, and every rule of fair representation conspire to condemn a principle, which gives to Rhode-Island an equal weight in the scale of power with Massachusetts, or Connecticut, or New-York; and to Delaware, an equal voice in the national deliberations with Pennsylvania or Virginia, or North-Carolina. Its operation contradicts that fundamental maxim of republican government, which requires that the sense of the majority should prevail. Sophistry may reply, that sovereigns are equal, and that a majority of the votes of the States will be a majority of confederated America. But this kind of logical legerdemain will never counteract the plain suggestions of justice and common sense. It may happen that this majority of States is a small minority of the people of America; and two thirds of the

[15] Hereinafter referred to as "*The Federalist*."

people of America, could not long be persuaded, upon the credit of artificial distinctions and syllogistic subleties, to submit their interests to the management and disposal of one third. The larger States would after a while revolt from the idea of receiving the law from the smaller. To acquiesce in such a privation of their due importance in the political scale, would be not merely to be insensible to the love of power, but even to sacrifice the desire of equality. * * *

It may be objected to this, that not seven but nine States, or two thirds of the whole number must consent to the most important resolutions; and it may be thence inferred, that nine States would always comprehend a majority of the inhabitants of the Union. But this does not obviate the impropriety of an equal vote between States of the most unequal dimensions and populousness; nor is the inference accurate in point of fact; for we can enumerate nine States which contain less than a majority of the people; and it is constitutionally possible, that these nine may give the vote.

But this is not all; what at first sight may seem a remedy, is in reality a poison. To give a minority a negative upon the majority (which is always the case where more than a majority is requisite to a decision) is in its tendency to subject the sense of the greater number to that of the lesser number. Congress from the non-attendance of a few States have been frequently in the situation of a Polish Diet, where a single veto has been sufficient to put a stop to all their movements. A sixtieth part of the Union, which is about the proportion of Delaware and Rhode-Island, has several times been able to oppose an intire bar to its operations. This is one of those refinements which in practice has an effect the reverse of what is expected from it in theory. * * * In those emergencies of a nation, in which the goodness or badness, the weakness or strength of its government, is of

> the greatest importance, there is commonly a necessity for action. The public business must in some way or other go forward. If a pertinacious minority can controul the opinion of a majority respecting the best mode of conducting it; the majority in order that something may be done, must conform to the views of the minority; and thus the sense of the smaller number will over-rule that of the greater, and give a tone to the national proceedings. Hence tedious delays—continual negotiation and intrigue—contemptible compromises of the public good. And yet in such a system, it is even happy when such compromises can take place: For upon some occasions, things will not admit of accommodation; and then the measures of government must be injuriously suspended or fatally defeated. It is often, by the impracticability of obtaining the concurrence of the necessary number of votes, kept in a state of inaction. Its situation must always savour of weakness—sometimes border upon anarchy.

Hamilton described in Number 32 the balance between the States and the federal government under the proposed constitution (*The Federalist*, pp. 199–200):

> An intire consolidation of the States into one complete national sovereignty would imply an intire subordination of the parts; and whatever powers might remain in them would be altogether dependent on the general will. But as the plan of the Convention aims only at a partial Union or consolidation, the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act *exclusively* delegated to the United States. This exclusive delegation or rather this alienation of State sovereignty would only exist in three cases; where the Constitution in express terms granted an exclusive authority to the Union; where it granted in one

> instance an authority to the Union and in another prohibited the States from exercising the like authority; and where it granted an authority to the Union, to which a similar authority in the States would be absolutely and totally *contradictory* and *repugnant.*

In Number 39, James Madison similarly described the new system (*The Federalist*, pp. 254–255, 257):

> The house of representatives will derive its powers from the people of America, and the people will be represented in the same proportion, and on the same principle, as they are in the Legislature of a particular State. So far the Government is *national* not *federal.* The Senate on the other hand will derive its powers from the States, as political and co-equal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal,* not *national.* * * *
>
> * * * * * *
>
> The proposed Constitution therefore is, in strictness neither a national nor a federal constitution; but a composition of both. In its foundation, it is federal, not national; in the sources from which the ordinary powers of the Government are drawn, it is partly federal, and partly national: in the operation of these powers, it is national, not federal: In the extent of them again it is federal, not national: And finally, in the authoritative mode of introducing amendments, it is neither wholly federal, nor wholly national.

He repeated in Number 40 that the States continued to be independent sovereigns under the new constitution (*id.* at 262):

> We have seen that in the new government as in the old, the general powers are limited, and that the States in all unenumerated cases, are

> left in the enjoyment of their sovereign and independent jurisdiction.

See also *id.* at 261. Likewise, in Number 45, Madison said that "the States will retain under the proposed Constitution a very extensive portion of active sovereignty * * *" (*id.* at 310) and that (*id.* at 311–312):

> The State Governments may be regarded as constituent and essential parts of the federal Government; whilst the latter is nowise essential to the operation or organisation of the former. Without the intervention of the State Legislatures the President of the United States cannot be elected at all. They must in all cases have a great share in his appointment, and will perhaps in most cases of themselves determine it. The Senate will be elected absolutely and exclusively by the State Legislatures. Even the House of Representatives, though drawn immediately from the people, will be chosen very much under the influence of that class of men, whose influence over the people obtains for themselves an election into the State Legislatures. Thus each of the principal branches of the federal Government will owe its existence more or less to the favor of the State Governments, and must consequently feel a dependence, which is much more likely to beget a disposition too obsequious, than too overbearing towards them. On the other side, the component parts of the State Governments will in no instance be indebted for their appointment to the direct agency of the federal government, and very little if at all, to the local influence of its members.

In Number 54, Madison explained the basis for the apportionment of the House of Representatives (*The Federalist*, pp. 366, 368):

> It is not contended that the number of people in each State ought not to be the standard for

> regulating the proportion of those who are to represent the people of each State. * * * [T]he rule is understood to refer to the personal rights of the people, with which it has a natural and universal connection. * * *
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> * * * * * *
>
> * * * It is agreed on all sides, that numbers are the best scale of wealth and taxation, as they are the only proper scale of representation.

This proposition seemed to Madison, Hamilton, and John Jay, the writers of the Federalist Papers, to be so self-evident that this is the entire discussion devoted to the basic principle of apportioning one of the two houses of the legislature in their detailed exposition of the proposed constitution.

In contrast, Madison apparently felt compelled to explain the apportionment of the Senate at length in Number 62 (*The Federalist*, pp. 416–417):

> The equality of representation in the senate is another point, which, being evidently the result of compromise between the opposite pretensions of the large and the small states, does not call for much discussion. If indeed it be right that among a people thoroughly incorporated into one nation, every district ought to have a *proportional* share in the government; and that among independent and sovereign states bound together by a simple league, the parties however unequal in size, ought to have an *equal* share in the common councils, it does not appear to be without some reason, that in a compound republic partaking both of the national and federal character, the government ought to be founded on a mixture of the principles of proportional and equal representation. But it is superfluous to try by the standards of theory, a part of the constitution which is allowed on all hands to be the result not of theory, but "of a spirit of amity, and that

> mutual deference and concession which the peculiarity of our political situation rendered indispensable." A common government with powers equal to its objects, is called for by the voice, and still more loudly by the political situation of America. A government founded on principles more consonant to the wishes of the larger states, is not likely to be obtained from the smaller states. The only option then for the former lies between the proposed government and a government still more objectionable. Under this alternative the advice of prudence must be, to embrace the lesser evil; and instead of indulging a fruitless anticipation of the possible mischiefs which may ensue, to contemplate rather the advantageous consequences which may qualify the sacrifice.
>
> In this spirit it may be remarked, that the equal vote allowed to each state, is at once a constitutional recognition of the portion of sovereignty remaining in the individual states, and an instrument for preserving that residuary sovereignty. So far the equality ought to be no less acceptable to the large than to the small states; since they are not less solicitous to guard by every possible expedient against an improper consolidation of the states into one simple republic.

And in Number 58 Madison summarized the difference in functions between the House and Senate: "one branch of the legislature is a representation of citizens; the other of the states * * *." *Id.* at 392.

c. Other Post-Convention Materials Prior to the Ratifying Conventions.—George Mason, who did not sign the proposed Constitution, wrote on a draft of the Constitution as one of his reasons for this action that the Senate had "the power of altering all money bills, and of originating appropriations of money, and the salaries of the officers of their own appointment,

in conjunction with the President of the United States, although they are not the representatives of the people or amenable to them." II Farrand 638.

Pierce Butler, a delegate to the convention from South Carolina, wrote to Weedon Butler on October 8 describing the proposed constitution (III Farrand 102–103):

> We, in many instances took the Constitution of Britain, when in its purity, for a model, and surely We cou'd not have a better. We tried to avoid what appeared to Us the weak parts of Antient as well as Modern Republicks. * * * View the system then as resulting from a spirit of Accommodation to different Interests, and not the most perfect one that the Deputies cou'd devise for a Country better adapted for the reception of it than America is at this day, or perhaps ever will be. It is a great Extent of Territory to be under One free Government * * *. We have, as you will see, taken a portion of power from the Individual States, to form a General Government for the whole to preserve the Union. The General Government to Consist of two Branches of Legislature and an Executive to be vested in One person for four years, but elligible again—the first Branch of the Legislature to be elected by the People of the different States, agreeable to a ratio of numbers and wealth, to serve for two years. The Second to Consist of two members from each State, to be appointed by the Legislature of the States to serve for six years. * * * The powers of the General Government are so defined as not to destroy the Sovereignty of the Individual States.

In October 1787, a phamphlet was printed defending the Constitution which consisted largely of a speech written by Charles Pinckney of South Carolina which was intended to have been made to the Convention on

May 29. He attacked the weakness of the Constitution, including as one cause (III Farrand 108):

> The inequality of the principle of Representation, where the largest and most inconsiderable States have an equal vote in the affairs of the Union * * *.

Because of the many defects in the existing system, he proposed that the Convention (*ibid.*):

> * * * consider the subject de novo. That they will pay no farther attention to the Confederation, than to consider it as good materials, and view themselves as at liberty to form and recommend such a plan, as from their knowledge of the temper of the people, and the resources of the States, will be most likely to render our government firm and united. This appears to me, far more proper than to attempt the repair of a system, not only radically defective in principle, but which, if it was possible to give it operation, would prove absurd and oppressive.

Pinckney stated that (*id.* at 109–110):

> The first important alteration is, that of the principle of Representation, and the distribution of the different Powers of Government. In the federal Councils, each State ought to have a weight in proportion to its importance; and no State is justly entitled to a greater. A Representation is the sign of the reality. Upon this principle, however abused, the parliament of Great Britain is formed, and it has been universally adopted by the States in the formation of their Legislatures. * * * The abuse of this equality, has been censured as one of the most dangerous corruptions of the English Constitution; and I hope we shall not incautiously contract a disease that has been consuming them. Nothing, but necessity, could have induced Congress to ratify a Confederation upon other principles. It certainly was the opinion

> of the first Congress, in 1774, to acquire materials for forming an estimate of the comparative importance of each State; for, in the commencement of that session, they gave as a reason, for allowing each colony a vote, that it was not in their power, at that time, to procure evidence for determining their importance. This idea, of a just Representation, seems to have been conformable to the opinions of the best writers on the subject, that, in a confederated system, the members ought to contribute according to their abilities, and have a vote in proportion to their importance. But if each must have a vote, it can be defended upon no other ground, than that of each contributing an equal share of the public burdens: either would be a perfect system. The present must ever continue irreconcilable to justice. * * *
>
> The Senate, I propose to have elected by the House of Delegates, upon proportionable principles, in the manner I have stated, which, though rotative, will give that body a sufficient degree of stability and independence. The districts, into which the Union are to be divided, will be so apportioned, as to give to each its due weight, and the Senate, calculated in this, as it ought to be in every Government, to represent the wealth of the Nation.

This method of representation was based on Pinckney's view as to the proper relationship of the new national government and the States (*id.* at 112):

> I apprehend the true intention of the States in uniting, is to have a firm national Government, capable of effectually executing its acts, and dispensing its benefits and protection. In it alone can be vested those powers and prerogatives which more particularly distinguish a sovereign State. The members which compose the superintending Government are to be considered merely as parts of a great whole, and

> only suffered to retain the powers necessary to the administration of their State Systems. The idea which has been so long and falsely entertained of each being a sovereign State, must be given up; for it is absurd to suppose there can be more than one sovereignty within a Government. The States should retain nothing more than that mere local legislation, which, as districts of a general Government, they can exercise more to the benefit of their particular inhabitants * * *.

In concluding, Pinckney comments on the proposed constitution and states as one of his two objections to it the composition of the Senate. *Id.* at 127.

In a letter explaining why he had not signed the proposed constitution, Elbridge Gerry wrote that (III Farrand 128–129):

> As the convention was called for "the sole and express purpose of revising the articles of confederation, and reporting to congress, and the several legislatures, such alterations and provisions as shall render the federal constitution adequate to the exigencies of government, and the preservation of the union," I did not conceive that these powers extend to the formation of the plan proposed: but the convention being of a different opinion, I acquiesced in it, being fully convinced that to preserve the union, an efficient government was indispensably necessary; and that it would be difficult to make proper amendments to the articles of confederation.
>
> The constitution proposed has few if any federal features; but is rather a system of national government. Nevertheless, in many respects, I think it has great merit, and, by proper amendments, may be adapted to the "exigencies of government, and preservation of liberty."

Letter to the President of the Senate and Speaker of the House of Representatives of Massachusetts, October 18, 1787, III Farrand 128–129.

On October 24, 1787, Madison wrote Jefferson in detail concerning the new constitution (III Farrand 131–132):

> It was generally agreed that the objects of the Union could not be secured by any system founded on the principle of a confederation of Sovereign States. * * *
>
> Hence was embraced the alternative of a Government which instead of operating, on the States, should operate without their intervention on the individuals composing them; and hence the change in the principle and proportion of representation.

Madison explained the relationship of the States to the federal government (*id.* at 133–134):

> The second object, the due partition of power between the General & local Governments, was perhaps of all, the most nice and difficult. A few contended for an entire abolition of the States; Some for indefinite power of Legislation in the Congress, with a negative on the laws of the States; some for such a power without a negative; some for a limited power of legislation, with such a negative; the majority finally for a limited power without the negative. * * *
>
> * * * In the American Constitution the general authority will be derived entirely from the subordinate authorities. The Senate will represent the States in their political capacity; the other House will represent the people of the States in their individual capacity.

As to the apportionment of the Senate, Madison said (*id.* at 135):

> The remaining object created more embarrassment, and a greater alarm for the issue of

> the Convention than all the rest put together. The little States insisted on retaining their equality in both branches, unless a compleat aboiition of the State Governments should take place; and made an equality in the Senate a sine qua non. The large States on the other hand urged that as the new Government was to be drawn principally from the people immediately and was to operate directly on them, not on the States; and consequently as the States wd. lose that importance which is now proportioned to the importance of their voluntary compliances with the requisitions of Congress, it was necessary that the representation in both Houses should be in proportion to their size. It ended in the compromise which you will see, but very much to the dissatisfaction of several members from the large States.

James McHenry and Luther Martin, delegates at the convention, described its proceedings to the Maryland House of Delegates on November 29. As to apportionment of the legislature, McHenry said (III Farrand 147):

> That the Representatives should be appointed according to Numbers occasioned a very long, interesting and serious Debate. The Larger States warmly contended for this Regulation and were seriously opposed by the lesser—by the latter it was contended it threw too much power into the hands of the former, and it was answered by the former that Representation ought to be according to property, or numbers, and in either case they had a right to such influence as their Situation gave them, on the contrary if each State had an equal voice, it would unreasonably throw the whole power in the lesser States—in the end a compromise took place by giving an equal Voice to each State in the Senate which 'till then the larger States had contended ought to be formed like

the other branch by a Representation according to numbers."

Martin likewise emphasized the conflict between the large and small States at the convention (III Farrand 151–153):

> * * * in forming the Confederacy the State of Virginia proposed, and obstinately contended (tho unsupported by any other)[17] for representation according to Numbers: and the second resolve now brought forward by an Honourable Member from that State was formed in the same spirit that characteriz'd its representatives in their endeavours to increase its powers and influence in the Federal Government. * * *
>
> At length the Committee of Detail brought forward their Resolutions which gave to the larger States the same inequality in the Senate that they now are proposed to have in the House of Representatives—Virginia, Pennsylvania and Massachusetts would have one half—all the Officers and even the President were to be chosen by the Legislative: so that these three States might have usurped the whole power * * *.
>
> * * * Three parties now appeared in Convention; one were for abolishing all the State Governments; another for such a Government as would give an influence to particular States—and a third party were truly Federal, and acting for general Equallity—They were for considering, reforming and amending the Federal Government, from time to time as exper'ence might point out its imperfections, 'till it could be made competent to every exigence of State, and afford at the same time ample security to Liberty and general Welfare. * * *

[16] Since McHenry was not present for this debate, his description does not come from his own observations. III Farrand 147, note 1.

[17] This statement is incorrect. See pp. 8, 9, 19, 30, 37, 44, 61 above.

> When the principles of opposition were thus formed and brought forward by the 2d. S: respecting the manner of representation, it was urged by a Member of Pennsylvania, that nothing but necessity had induced the larger States to give up in forming the Confederacy, the Equality of Representation according to numbers—That all governments flowed from the People and that their happiness being the end of governments they ought to have an equal Representation. On the contrary it was urged by the unhappy Advocates of the Jersey System that all people were equally Free, and had an equal Voice if they could meet in a general Assembly of the whole. But because one Man was stronger it afforded no reason why he might injure another, nor because ten leagued together, they should have the power to injure five; this would destroy all equality * * *. The History of all Nations and sense of Mankind shew, that in all former Confederacies every State had an equal voice. Moral History points out the necessity that each State should vote equally—In the Cantons of Switzerland those of Bene & Lucerne have more Territory than all the others, yet each State has an equal voice in the General Assembly. The Congress in forming the Confederacy adopted this rule on the principle of Natural right—Virginia then objected.

He then explained his reasons for opposing the constitution. Included among them, he said that (*id.* at 155):

> * * * a Government of *States* ought to be *Federal,* and which the object of calling Convention, and not to establish a *National Government.* It begins We the People—And the powers are made to flow from them in the first instance. That in Federal Governments an equal voice in each State is essential, as being all in a *State of Nature* with respect to each

other. Whereas the only figure in this Constitution that has any resemblance to a federal one, is the equality of Senate * * *.

An entry in Ezra Stiles' diary on December 21 has an account of the convention received from Abraham Baldwin, a delegate from Georgia. Stiles stated that the convention was (III Farrand 168–169):

> * * * pretty unanimous in the following Ideas, viz. 1. In a firm foederal Government. * * * 4. That the Jurisdictions & Govt of each State shd be left intire & preserved as inviolate as possible consistent with the coercive Subordina for preservg the Union with Firmness. 5. That the present foederal Govt was inadequate to this End. 6. That a certain Portion or Deg. of Dominion as to *Laws* and *Revenue;* as well as to Treaties with foreign Nations, War & Armies, was necessy to be ceded by individual States to the Authory of the National Council. 7. That the National Council shd consist of two Branches viz, a Senate, & Representatives. That the last shd be a local Representa apportioned to the Property & Number of Inhabitants, as far as practicable. That this shd be the governg Idea. And yet that the Distinction of States shd be preserved in the House of Representa as well as in the Senate. 8. That the Senate stand on the Election & Distinction of States as at present in Congress, and tho' like the Representa be in some measure proportioned to the No of Inhab. yet that besides this the Vote in Senate shd be by States, tho' in the House of Representa the Vote shd be by Plurality of Members present indeed but not by States as States. Hereby two things are secured, one, that the People at large shall be efficaciously represented, the other that the States as separate States be as also efficaciously represented. 9. That these two Branches combined into one Republican Body be the supreme

Legislature & become vested with the Sovereignty of the Confederacy * * *.

From December 28, 1787, to February 8, 1788, Luther Martin's "Genuine Information" was printed in the *Maryland Gazette and Baltimore Advertiser*. It consisted of an expanded version of the speech he made to the Maryland House of Delegates on November 29 (see pp. 79–80 above). Martin stated that the believers in a federal system were (III Farrand 179–186):

> * * * for taking our present *federal system* as the basis of their proceedings, and, as far as experience had shown us that there were defects, to remedy those defects; as far as experience had shown that other powers were necessary to the federal government, to give those powers. They considered this the object for which they were sent by their States, and what their States expected from them * * *.
>
> * * * * *
>
> * * * Those who advocated [*inequality* of representation in the *first* branch] urged, that, when the articles of confederation were formed, it was *only* from *necessity* and *expediency* that the States were admitted *each* to have an *equal vote;* but that our situation was *now altered*, and therefore those States who considered it contrary to their interest, would *no longer abide* by it. They said, no State ought to wish to have influence in government, except in proportion to what it contributes to it; that, if it contributes but little, it ought to have but a small vote; that taxation and representation ought always to go together; that if one State had *sixteen times as many inhabitants* as *another;* or was *sixteen times as wealthy,* it ought to have *sixteen times as many votes;* that an inhabitant of Pennsylvania ought to have as much weight and consequence as an inhabitant

of Jersey or Delaware; that it was contrary to the feelings of the human mind; what the *large States* would *never* submit to; that the *large States* would have *great objects* in view, in which they would never permit the *smaller States* to thwart them; that *equality of suffrage* was the rotten part of the constitution, and that this was a happy time to get clear of it. In fine, that it was the poison which contaminated our whole system, and the source of all the evils we experienced.

This, *Sir*, is the substance of the arguments, if arguments they may be called, which were used in favor of *inequality of suffrage*. Those who advocated the *equality of suffrage*, took the matter upon the original principals of government; they urged, that all men, considered in a state of nature, before any government is formed, are equally free and independent, no one having any right or authority to exercise power over another, and this *without any regard to difference in personal strength, understanding, or wealth*. That, when such individuals enter into government, they have *each* a right to an *equal voice* in its first formation, and afterwards have *each* a right to an *equal vote* in every matter which relates to their government. That, if it could be done conveniently, they have a right to exercise it in person. Where it cannot be done in person, but for convenience representatives are appointed, to act for them, *every person* has a right to an *equal vote* in choosing that representative; who is intrusted to do for the whole, that which the whole, if they could assemble, might do in person, and in the transaction of which, each would have an equal voice. That, if we were to admit, because a man was *more wise, more strong*, or *more wealthy*, he should be entitled to *more votes* than another it would be *inconsistent with the freedom and liberty of that other*, and

would reduce him to *slavery*. Suppose, for instance, ten individuals in a state of nature, about to enter into government, *nine* of whom are *equally wise*, *equally strong*, and *equally wealthy*, the *tenth is ten times as wise*, ten times *as strong*, or ten times as *rich*; if, for this reason, he is to have *ten votes* for each *vote of either of the others*, the *nine* might as well have *no vote at all*; since, though the *whole nine* might assent to a measure, yet the vote of *the tenth* would *countervail*, and *set aside all their votes*. * * *

Having thus established these principles, with respect to the *rights of individuals* in a *state of nature*, and what is due to *each*, on entering into government, (principles established by every writer on liberty,) they proceeded to show, that *States*, when *once formed*, are considered, *with respect* to *each other*, as *individuals* in a state of nature; that, like individuals, each *State* is considered *equally free* and *equally independent*, the one having no right to exercise authority *over* the other, though more *strong*, *more wealthy*, or *abounding with more inhabitants*. That, when a number of *States* unite themselves under a *federal government*, the *same principles apply to them, as when a number of individual men* unite themselves under a *State government*. That every argument which shows *one man* ought not to have *more votes* than *another*, because he is *wiser*, *stronger*, or *wealthier*, proves that *one State* ought not to have *more votes* than *another*, because it is *stronger*, *richer*, or *more populous*. And, that by *giving one State*, or *one or two States*, *more votes* than the *others*, the *others* thereby are *enslaved to such State or States*, having the *greater number of votes*, in the *same manner* as in the case before put, of *individuals*, when one has *more votes than the others*. That the reason why each individual man in forming a State government should have an equal vote,

> is because each individual, before he enters into government, is *equally free* and *independent.* So *each State,* when *States enter* into a federal government, are entitled to an equal vote; because, before they enter into such federal government, *each State was equally free* and *equally independent.* * * *
>
> * * * * *
>
> * * * That the *thirteen States* are *thirteen distinct political individual existences,* as to each other; that the *federal government* is, or *ought to be,* a government *over these thirteen political individual existences,* which form the members of that government; and that, as the *largest State,* is only a *single individual* of this government, it ought to have only *one vote;* the *smallest State,* also being *one individual member* of this government, ought also to have *one vote.*
>
> It was denied that the *equality of suffrage* was *originally* agreed to [in the confederation] on principles of *necessity* or *expediency;* on the contrary, that it was adopted on the principles of the *rights of men* and the *rights of States,* which were *then* well known, and which then influenced our conduct, although *now* they seem to be *forgotten.*

When the large States threatened that they would never agree to a system of equal representation, Martin said that the small States answered (III Farrand 186):

> That *slavery* was the *worst* that could ensue, and we considered the *system proposed* to be the *most complete, most abject* system of *slavery* that the wit of man ever devised, under the *pretence* of forming a government for free States.

He described the issue whether there should be one or two legislative bodies as a conflict between those in

favor of national and federal government (*id.* at 191–193):

> * * * those who were for *two* branches in the legislature, a House of Representatives and a Senate, urged the necessity of a *second branch*, to serve as a *check* upon the *first*, and used all those trite and common-place arguments which may be proper and just, when applied to the formation of a *State government*, over *individuals* variously distinguished in their habits and manners, fortune and rank * * *. But, on the other side, it was urged, that none of those arguments could with propriety be *applied* to the formation of a *federal government* over a number of *independent States;* that it is the *State governments* which are to watch over and protect the *rights* of the *individual*, whether *rich* or *poor*, or of *moderate circumstances*, and in which the *democratic* and *aristocratic influence* or principles are to be so *blended, modified*, and *checked*, as to prevent *oppression* and *injury;* that the federal government is to guard and protect the *States* and their *rights*, and to regulate *their common concerns;* that a *federal government* is formed by the *States*, as *States*, that is, in their *sovereign* capacities, in the same manner as *treaties* and *alliances* are formed; that *sovereignties*, considered as such, cannot be said to have jarring interests or principles, the one aristocratic, and the other democratic * * *.
>
> It was urged, that the government we were forming was not in reality a *federal*, but a *national* government; not founded on the principles of the *preservation*, but the abolition or consolidation of all *State governments;* that we appeared *totally to have forgot* the business for which we were sent, and the situation of the country for which we were preparing our system—That we had not been sent to form a

government over the *inhabitants* of America, considered as *individuals;* that as individuals, they were all subject to their respective State governments, which government would still remain, though the federal government should be dissolved * * *.

Whereas it was urged, that the principles on which a *federal* government over *States* ought to be *constructed* and *ratified,* are the *reverse;* that instead of the legislature consisting of *two* branches, *one* branch was sufficient, whether examined by the *dictates* of *reason,* or the *experience* of *ages;* that the *representation,* instead of being drawn from the *people* at large, as *individuals,* ought to be drawn from the *States as States,* in their *sovereign* capacity; that, in a *federal* government, the *parties* to the compact are not the *people,* as *individuals,* but the States, as States; and that it is by the *States* as States, in their *sovereign* capacity, that the system of government ought to be *ratified;* and not by the *people, as individuals.*

It was further said, that, in a *federal* government over States *equally* free, sovereign, and independent, *every State* ought to have an equal share in *making* the *federal laws* or *regulations,* in deciding upon them, and in *carrying them into execution; neither* of which was the case in this system, but the *reverse;* the States not having an *equal voice* in the *legislature,* nor in the *appointment* of the *executive,* the *judges,* and the *other officers of government.* It was insisted, that, in the *whole* system, there was but *one federal* feature,—the appointment of the senators by the States in their sovereign capacity, that is, by their legislatures, and the equality of suffrage in that branch; but it was said, that *this feature* was only *federal* in *appearance.*

Martin strongly emphasized that the proposed convention created a national, not a federal, government (*id.* at 195):

> Nay, so far were the friends of the system from pretending that they meant it, or considered it as a *federal* system, that on the question being proposed, "that a union of the States, merely federal, ought to be the sole object of the exercise of the powers vested in the convention," it was negatived by a majority of the members, and it was resolved "that a national government ought to be formed." Afterwards the word *"national"* was struck out by them, because they thought the *word* might tend to *alarm;* and although, *now,* they who *advocate* the system pretend to call themselves *federalists,* in convention the distinction was quite the reverse; those who *opposed* the system were *there* considered and styled the *federal party,* those who advocated it, the *antifederal.*

Robert Yates and John Lansing, both delegates to the convention from New York, reported to the governor their opposition to the constitution because it was a "consolidation of the United States into one government." III Farrand 245. They explained (*id.* at 245–246):

> Nor could we suppose, that if it had been the intention of the legislature, to abrogate the existing confederation, they would, in such pointed terms, have directed the attention of their delegates to the revision and amendment of it, in total exclusion of every other idea.
>
> Reasoning in this manner, we were of opinion, that the leading feature of every amendment, ought to be the preservation of the individual states, in their uncontrouled constitutional rights * * *.

Luther Martin explained in the *Maryland Journal* of March 18th his ideas on the marked distinction

between the state and federal governments (III Farrand 284):

> In a state government, I consider all power flowing immediately from the people in their individual capacity, and that the people, in their individual capacity, have, and ought to have the right of choosing delegates in a state legislature, the business of which is to make laws, regulating their concerns, as individuals, and operating upon them as such; but in a federal government, formed over free states, the power flows from the people, and the right of choosing delegates belongs to them only mediately through their respective state governments which are the members composing the federal government, and from whom all its power immediately proceeds; to which state governments, the choice of the federal delegates immediately belongs.

In May 1788, John Dickinson, in one of his Letters of Fabius, defended the equal representation of the States in the Senate (III Farrand 304):

> There is another improvement equally deserving regard, and that is, the varied representation of sovereignties and people in the constitution now proposed.
>
> It has been said, that this representation was a mere compromise.
>
> It was not a mere compromise. *The equal representation of each state in one branch of the legislature,* was an original substantive proposition, made in convention, very soon after the draft offered by Virginia, to which last mentioned state United America is much indebted not only in other respects, but for her merit in the origination and prosecution of this momentous business.
>
> The proposition was expressly made upon this principle, that a territory of such extent as that of United America, could not be safely

> and advantageously governed, but a combination of republics, each retaining all the rights of supreme sovereignty, excepting such as ought to be contributed to the union; that for the securer preservation of these sovereignties, they ought to be represented in a body by themselves, and with equal suffrage; and that they would be annihilated, if both branches of the legislature were to be formed of representatives of the people, in proportion to the number of inhabitants in each state.

d. The Ratifying Conventions.—In the Massachusetts convention, various delegates emphasized the sharp distinction between the function of the Senate and the House of Representatives. Fisher Ames, later a Congressman, stated that (II *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* (Elliot editor, 2d ed., 1854),[18] p. 11):

> The senators will represent the sovereignty of the states. The representatives are to represent the people.

Christopher Gore similarly remarked (*id.* at 18):

> The Senate represents the sovereignty of the states; the House of Representatives the people of the United States.

And E. Pierce said (*id.* at 22):

> [T]he federal representatives, who are to form the democratical part of the general government, are to be a check on the representatives of the sovereignty, the senate * * *.

In the debate on the constitution of the Senate, Fisher Ames defended the provision that Senators serve for six years (II Elliot 46):

> The *senators* represent the *sovereignty of the states;* in the other house, individuals are rep-

[18] Hereinafter referred to as "Elliot."

> resented. * * * [Senators] are in the quality of ambassadors of the states * * *. If they would be brought by that means more immediately under the influence of the people, then they will represent the state legislatures less, and become the representatives of individuals. This belongs to the other house. The absurdity of this, and its repugnancy to the federal principles of the Constitution, will appear more fully, by supposing that they are to be chosen by the people at large. If there is any force to the objection to this article, this would be proper. But whom in that case, would they represent?—Not the legislatures of the states, but the people. This would totally obliterate the federal features of the Constitution.

Continuing this debate, Rufus King, a delegate to the Congress under the Confederation and to the federal convention, noted (*id.* at 47):

> [A]s the Senate preserved the equality of the states, their apportionment is equal.

In the debate on Article I, Section 4, which gives Congress power to regulate federal elections, George Cabot, later a United States Senator, stated (II Elliot 25–26):

> [*A*] *free and equal representation is the best, if not the only foundation upon which a free government can be built;* and, consequently, that the greatest care should be taken in laying it. * * * I consider the *democratic* branch of the national government, the branch chosen immediately for the people, as intended to be a *check* on the *federal* branch, which latter is not an immediate representation of the people of America, and is not chosen by them, but is a representation of the sovereignty of the individual states, and its members delegated by the several state legislatures * * *. [Emphasis in original.]

Immediately thereafter Theophilus Parsons, a leading attorney, said (*id.* at 26–27):

> In the Congress, not only the sovereignty of the states is represented in the Senate, but, to balance their power, and to give the people a suitable and efficient check upon them, the federal representatives are introduced into Congress. The legislatures of the several states are the constituents of the Senate, and the people are the constituents of the Representatives * * *. [A state legislature] might make an unequal and partial division of the states into districts for the election of representatives, or they might even disqualify one third of the electors. Without these powers in Congress, the people can have no remedy; but the 4th section provides a remedy, a controlling power in a legislature, composed of senators and representatives of twelve states, without the influence of our commotions and factions, who will hear impartially and preserve and restore to the people their equal and sacred rights of election.

Continuing the debate on this provision, Dr. Charles Jarvis argued (*id.* at 29):

> The right of election, founded on the principle of equality, was, he said, the basis on which the whole superstructure was erected; this right was inherent in the people; it was unalienable in its nature, and it could not be destroyed without presuming a power to subvert the Constitution, of which this was the principal; and by recurring to the 2d section, it would appear that "*representatives and direct taxes shall be apportioned among the several states according to their respective numbers;*" it equally appeared that 30,000 inhabitants were entitled to send a representative, and that wherever this number

> was found, they would have a right to be represented in the federal legislature.[19]

Judge Francis Dana, who was a member of the Congress under the Confederation and who was chosen to attend the federal convention but was unable to do so, also defended Article I, Section 4 (II Elliot 49):

> The legislature of Rhode Island has lately formed a plan to alter their representation to corporations, which ought to be by numbers. Look at Great Britain, where the injustice of this mode is apparent. Eight tenths of the people there have no voice in the elections. A borough of but two or three cottages has a right to send two representatives to *Parliament*, while Birmingham, a large and populous manufacturing town, lately sprung up, cannot send one. The legislature of Rhode Island are about adopting this plan, in order to deprive the towns of Newport and Providence of their weight, and that thereby the legislature may have a power to counteract the will of a majority of the people.

Rufus King immediately agreed with Dana in support of Article I, Section 4 (*id.* at 50–51):

> In Connecticut, they do not choose by numbers, but by corporations. Hartford, one of their largest towns, sends no more delegates than one of their smallest corporations, each town sending two, except latterly, when a town was divided. The same rule is about to be adopted in Rhode Island. The inequality of such representation, where every corporation

[19] Delegates Holmes and Widgery pointed out that the Constitution did not provide for a representative for every 30,000 people but a maximum of one representative for every 30,000 people. II Elliot 30, 32.

> would have an equal right to send an equal number of representatives, was apparent. In the Southern States, the inequality is greater. By the constitution of South Carolina, the city of Charleston has a right to send thirty representatives to the General Assembly; the whole number of which amounts to two hundred. The back parts of Carolina have increased greatly since the adoption of their constitution, and have frequently attempted an alteration of this unequal mode of representation; but the members from Charleston, having the balance so much in their favor, will not consent to an alteration; and we see that the delegates from Carolina in Congress have always been chosen by the delegates of that city. The representatives, therefore, from that state will not be chosen *by the people*, but will be the representatives of a faction of that state.

Later in the debate, two speakers emphasized that most American legislatures were apportioned on the basis of population. John Coffin Jones said (II Elliot 75):

> [T]he people of the United States are an enlightened, well-informed people, and are, therefore, not easily imposed on by designing men. Our right of representation, concluded Mr. J., is much more just and equitable than the boasted are of Great Britain, whose representatives are chosen by corporations or boroughs * * *.

Similarly, James Bowdoin, a member of the Congress under the Confederation and former governor, remarked that (*id.* at 127):

> The equality of representation is determined in nearly all the states by numbers; so it is in the federal Constitution.

In the Connecticut convention, Oliver Wolcott a delegate to the Continental Congress and later governor, defended the proposed constitution. In doing so, he said (II Elliot 202):

> The Senate, a constituent branch of the general legislature, without whose assent no public act can be made, are appointed by the states, and will secure the rights of the several states. The other branch of the legislature, the Representatives, are to be elected by the people at large. They will therefore be the guardians of the rights of the great body of the citizens.

Similarly, during the New York convention, Melancton Smith, a delegate to the Continental Congress, said (II Elliot 311):

> [A]s the senators are the representatives of the *state legislatures*, it is reasonable and proper that they should be under their control.

Alexander Hamilton described the conflict over representation in Congress (*id.* at 236):

> On the other hand, the small states, seeing themselves embraced by the Confederation upon equal terms, wished to retain the advantages which they already possessed. The large states, on the contrary, thought it improper that Rhode Island and Delaware should enjoy an equal suffrage with themselves. From these sources a delicate and difficult contest arose. It became necessary, therefore, to compromise, or the Convention must have dissolved without effecting any thing.

Robert Lansing likewise said (*id.* at 272):

> When the subject of the apportionment of representatives came forward, the large states insisted that the equality of suffrage should be

> abolished. This the small states opposed contending that it would reduce them to a state of subordination. There was such a division that a dissolution of the Convention appeared unavoidable, unless some conciliatory measure was adopted.

Later in the convention, Lansing described the nature of the Senate (*id.* at 289):

> I believe it was undoubtedly the intention of the framers of this Constitution to make the lower house the proper, peculiar representative of the interests of the people; the Senate, of the sovereignty of the states.

Patrick Henry, the great orator of the Revolution and former governor, was one of the leading opponents of the Constitution at the Virginia convention. One of his principal objections to the Constitution involved representation in Congress (III Elliot 46–47):

> [The Constitution] says that there shall not be more representatives than one for every thirty thousand. Now, sir, how easy is it to evade this privilege! "The number shall not exceed one for every thirty thousand." This may be satisfied by one representative from each state. Let our numbers be ever so great, this immense continent may, by this artful expression, be reduced to have but thirteen representatives * * *. When population increases, and a state shall send representatives in this proportion, Congress *may* remand them, because the right of having one for every thirty thousand is not clearly expressed. * * * [W]e may fairly conclude that they *may* restrain the number to one from each state. Perhaps the same horrors may hang over my mind again.

Later in the debate, he similarly contended (*id.* at 324):

> The honorable gentleman was pleased to say that the representation of the people was the vital principle of this government. I will readily agree that it ought to be so. But I contend that this principle is only nominally, and not substantially, to be found there. We contended with the British about representation. They offered us such a representation as Congress now does. They called it a virtual representation. If you look at that paper, you will find it so there. Is there but a virtual representation in the upper house? The states are represented, as *states*, by two senators each. This is virtual, not actual. They encounter you with Rhode Island and Delaware. This is not an actual representation. What does the term *representation* signify? It means that a certain district—a certain association of men—should be represented in the government, for certain ends. These ends ought not to be impeded or obstructed in any manner. Here, sir, this populous state has not an adequate share of legislative influence. The two petty states of Rhode Island and Delaware, which, together are infinitely inferior to this state in extent and population, have double her weight, and can counteract her interest. I say that the representation in the Senate, as applicable to states, is not actual. Representation is not, therefore, the vital principle of this government. So far it is wrong.

Another opponent of the Constitution, William Grayson, a former member of the Continental Congress and later to be a United States Senator, similarly argued (III Elliot 280):

> A democratic branch marked with the strong features of aristocracy, and an aristocratic

> branch with all the impurities and imperfections of the British House of Commons, arising from the inequality of representation and want of responsibility. There will be plenty of Old Sarums [a rotten borough], if the new Constitution should be adopted. Do we love the British so well as to imitate their imperfections? We could not effect it more than in that particular instance. Are not all defects and corruptions founded on an inequality of representation and want of responsibility?

A few moments later, Grayson said (*id.* at 281):

> But the British House of Commons are corrupted from the same cause that our representatives will be: I mean *from the Old Sarums* among them—from the inequality of the representation.

Grayson objected to the power of the Senate to propose amendments to "money bills." He said that in the lower house (*id.* at 376):

> * * * the people are represented according to their numbers. In the upper house, the states are represented in their political capacities. Delaware or Rhode-Island has as many representatives here as Massachusetts. Why should the senate have a right to intermeddle with money, when the representation is neither equal or just?

In defending the need for Congressional control over federal elections provided in Article I, Section 4, James Madison said (III Elliot 367):

> Elections are regulated now unequally in some states, particularly South Carolina, with respect to Charleston, which is represented by thirty members.

William Richardson Davie, a delegate to the national convention, described its proceedings to the

North Carolina ratifying convention. As to Congress, he stated (IV Elliot 21):

> The House of Representatives are immediately elected by the people. The senators represent the sovereignty of the states; they are directly chosen by the state legislatures, and no legislative act can be done without their concurrence.

Concerning the nature of the new federal system, Davie said (*id.* at 22–23):

> Every member saw that the existing system would ever be ineffectual, unless its laws operated on individuals, as military coercion was neither eligible nor practicable. Their own experience was fortified by their knowledge of the inherent weakness of all confederate governments. They knew that all governments merely federal had been short-lived, or had existed from principles extraneous from their constitutions, or from external causes which had no dependence on the nature of their governments. These considerations determined the Convention to depart from that solecism in politics—the principle of legislation for states in their political capacities.
>
> The great extent of country appeared to some a formidable difficulty; but a confederate government appears, at least in theory, capable of embracing the various interests of the most extensive territory. Founded on the state governments solely, as I have said before, it would be tottering and inefficient. It became, therefore, necessary to bottom it on the people themselves, by giving them an immediate interest and agency in the government. * * *
>
> The business of the Convention was to amend the Confederation by giving it additional powers. The present form of Congress, being a single body, it was thought unsafe to augment its powers, without altering its organization.

James Iredell, one of the initial members of this Court, was one of the leading supporters of the proposed constitution at the North Carolina convention. In doing so, he defended the balance of the new federal system (IV Elliot 38–39):

> Thus, then, the general government is to be taken care of, and the state governments to be preserved. The former is done by a numerous representation of the people of each state, in proportion of its importance. The latter is effected by giving each state an equal representation in the Senate. The people will be represented in one house, the state legislatures in the other * * *. The House of Representatives * * * will represent the immediate interests of the people. * * * The respectability of their constituents, who are the free citizens of America, will add great weight to the representatives * * *.

Subsequently, he similarly remarked (*id.* at 133):

> It is true that it would be very improper if the Senate had authority to prevent the House of Representatives from protecting the people. It would be equally so if the House of Representatives were able to prevent the Senate from protecting the sovereignty of the states.

Richard Dobbs Spaight, a delegate at the federal convention, explained the reason that the Senate was required to concur in treaties (IV Elliot 27):

> [i]t was thought better to put that power into the hands of the senators as representatives of the states—that thereby the interest of every state was equally attended to in the formation of treaties—but that it was not considered as a legislative act at all.

Davie likewise defended this requirement, saying that it was (*id.* at 120):

> * * * indispensable to give to the senators, as representatives of states, the power of making, or rather ratifying, treaties. Although it militates against every idea of just proportion that the little state of Rhode Island should have the same suffrage with Virginia, or the great commonwealth of Massachusetts, yet the small states would not consent to confederate without an equal voice in the formation of treaties.

In defending Article I, Section 4, which gives Congress power to regulate federal elections, Davie remarked that (IV Elliot 58):

> * * * a consolidation of the states is said by some gentlemen to have been intended. They insinuate that this was the cause of their giving this power of elections. If there were any seeds in this Constitution which might, one day, produce a consolidation, it would, sir, with me, be an insuperable objection, I am so perfectly convinced that so extensive a country as this can never be managed by one consolidated government. The Federal Convention were as well convinced as the members of this house, that the state governments were absolutely necessary to the existence of the federal government. They considered them as the great massy pillars on which this political fabric was to be extended and supported; and were fully persuaded that, when they were removed, or should moulder down by time, the general government must tumble into ruin. A very little reflection will show that no department of it can exist without the state governments.

John Steele, later a Congressman, also defended Article I, Section 4 against the charge that it would

allow Congress to pass laws ensuring the election of persons on the seacoast (*id.* at 71):

> They [Congress] may, and most probably will, lay the state off into districts. * * * If the Congress makes laws inconsistent with the Constitution, independent judges will not uphold them, nor will the people obey them.

Charles Pinckney, a delegate at Philadelphia, described the proceedings in the South Carolina Convention. Concerning the question of representation, he said that (IV Elliot 256–257):

> The degree of weight which each state was to have in the federal council became a question of much agitation. The larger states contended that no government could long exist whose principles were founded in injustice; that one of the most serious and unanswerable objections to the present system was the injustice of its tendency in allowing each state an equal vote, notwithstanding their striking disparity. The small ones replied, and perhaps with reason, that, as the states were the pillars upon which the general government must ever rest, their state governments must remain; that, however they may vary in point of territory or population, as political associations they were equal; that upon these terms they formally confederated, and that no inducement whatsoever should tempt them to unite upon others * * *.
>
> After much anxious discussion,—for, had the Convention separated without determining upon a plan, it would have been on this point,—a compromise was effected, by which it was determined that the first branch be so chosen as to represent in due proportion the people of the Union; that the Senate should be the representatives of the states, where each should have an equal weight.

Charles Cotesworth Pinckney, another delegate to the federal convention, likewise stated (*id.* at 282–283):

> As we have found it necessary to give very extensive powers to the federal government both over the persons and estates of the citizens, we thought it right to draw one branch of the legislature immediately from the people, and that both wealth and numbers should be considered in the representation.

Pinckney supported the provisions concerning Congress (*id.* at 304):

> [I]n the general Constitution, the House of Representatives will be elected immediately by the people, and represent them and their personal rights individually; the Senate will be elected by the state legislatures, and represent the states in their political capacity * * *.

James Wilson, on November 24, 1787, wrote a letter explaining the constitution to the Pennsylvania ratifying convention. As to the basic nature of the new government, he stated (III Farrand 140):

> At this period, America has it in her power to adopt either of the following modes of government: She may dissolve the individual sovereignty of the States, and become one consolidated empire; she may be divided into thirteen separate, independent and unconnected commonwealths; she may be erected into two or more confederacies; or, lastly, she may become one comprehensive Federal Republic. * * *
>
> Of [the first] three species of government, however, I must observe, that they obtained no advocates in the Federal Convention, nor can I presume that they will find advocates here, or in any of our sister States. The general sentiment in that body, and, I believe, the general

> sentiment of the citizens of America, is expressed in the motto which some of them have chosen, UNITE OR DIE; and while we consider the extent of the country, so intersected and almost surrounded with navigable rivers, so separated and detached from the rest of the world, it is natural to presume that Providence has designed us for an united people, under one great political compact. If this is a just and reasonable conclusion, supported by the wishes of the people, the Convention did right in proposing a single confederated Republic.

In the ratifying convention itself, Wilson, one of the leading exponents of apportionment based on population in both houses, said (III Farrand 144):

> The truth is, Sir, that the framers of this system were particularly anxious, and their work demonstrates their anxiety, to preserve the state governments unimpaired—it was their favorite object; and, perhaps, however proper it might be in itself, it is more difficult to defend the plan on account of the excessive caution used in that respect than from any other objection that has been offered here or elsewhere. * * * I trust it is unnecessary to dwell longer upon this subject; for, when gentlemen assert that it was the intention of the federal convention to destroy the sovereignty of the states, they must conceive themselves better qualified to judge of the intentions of that body than its own members, of whom not one, I believe, entertained so improper an idea.

Later, Wilson similarly stated (*id.* at 162):

> I say, Sir, that it was the design of this system, to take some power from the State government, and to place it in the general government. It was also the design, that the people should be admitted to the exercise of some powers which they did not exercise under

> the present confederation. It was thought proper that the citizens, as well as the States, should be represented * * *.

e. Materials on the Constitution Originating after the Start of the New Government.—In 1796, President Washington's Message to the House of Representatives explained why it was not necessary under the Constitution to submit Jay's treaty with Great Britain to the House (III Farrand 371):

> It is a fact, declared by the General Convention, and universally understood, that the Constitution of the United States was the result of a spirit of amity and mutual concession. And it is well known that, under this influence, the smaller States were admitted to an equal representation in the Senate, with the larger States; and that this branch of the Government was invested with great powers; for, on the equal participation of those powers, the sovereignty and political safety of the smaller States were deemed essentially to depend.

Jonathan Dayton, a delegate from New Jersey at the constitutional convention, described the compromise between the large and small States in the Senate in 1803 (III Farrand 400–403):

> Mr. Dayton believed it would come to this, that when the question came to be discussed, and the rights of the small States maintained, the large States would threaten us with their power. The same threats had been heard in the old Congress, but they were laughed at, for the votes of the States were equal; they were heard in the Convention, but they were spurned at, for the votes were equal there also; the large States must be cautious here, for in this body, too, the votes are equal. * * * The States, whatever was their relative magnitude, were equal under the old Confederation, and the

small States gave up a part of their rights as a compromise for a better form of government and security; but they cautiously preserved their equal rights in the Senate and in the choice of a Chief Magistrate.

* * * * * *

* * * But a few years ago we were equal in votes and influence, though inferior in size and population, to the largest States. We consented to give up a certain portion of that influence for the general good, expressly retaining the other portion for our own protection and security. This instrument, the Constitution, which we have sworn to support, and are now about to deface, is the new compact which that temper produced. It is the great plan of compromise between the jarring and contending interests of the great and small States.

In a letter written in 1803, Gouverneur Morris also described the compromise (III Farrand 404–405):

That if, in the new legislature, as in the old Congress, each had been equally represented, and each preserved an equal vote, the sacrifice or rights would have been equal. But when it was admitted, that, in the National Legislature, the Representatives should be appointed according to the number of citizens, the sacrifice of rights was great, in proportion as the States were small. Thus Delaware, which had but one Representative out of sixty-five, retained only one sixty-fifth part of the nation's authority; and Virginia, which had ten Representatives, obtained two thirteenths. Wherefore, since each had previously enjoyed one thirteenth, Delaware lost four fifths of its power, and that of Virginia was doubled, so that Delaware, compared to Virginia, was reduced under the new establishment from equality to one tenth. It

> was moreover evident, that the course of population would daily increase this decided superiority of the great States. That, of course, if the whole power of the union had been *expressly* vested in the House of Representatives, the smaller States would never have adopted the Constitution. But in the Senate they retained an equal representation, and to the Senate was given a considerable share of those powers exercised by the old Congress.

In 1818 Charles Pinckney, a delegate to the federal convention, wrote to John Quincy Adams concerning the proceedings of the convention. He said (III Farrand 427):

> My Plan was substantially adopted in the sequel except as to the Senate & giving more power to the Executive than I intended—the force of Vote which the small & middling states had in the Convention prevented our obtaining a proportional representation in more than one branch * * *.

A little over a year later, Pinckney stated in the Senate (*id.* at 441–442):

> On a motion from Virginia the Convention met at Philadelphia, where, as you will find from the Journals, we were repeatedly in danger of dissolving without doing any thing; that body being equally divided as to large and small States, and each having a vote, and the small States insisting most pertinaciously, for near six weeks, on equal power in both branches—nothing but the prudence and forbearance of the large States saved the Union. A compromise was made, that the small States and large should be equally represented in the Senate, and proportionally in the House of Representatives. * * *
>
> * * * [The small States] did, by force, or something like it, deprive us of a rightful part of our representation * * *.

In 1824, Rufus King wrote a letter explaining the Constitution's provisions concerning the election of President (III Farrand 462–463):

> The election of the Pr., as it is one of the most important, so it is one of the most intricate provisions of the Constitution, and in its object, except in the first stage of the process, is assigned to the States acting in their federal equal capacity. For this reason, measures which may be employed in the several States, under regulations and provisions of simple, and single sovereignties, could not be adopted in the balanced system of the Constitution of the U.S.—a compact between the States, wh. contains special provisions whereby the executive, legislative and judicial officers must be appointed.

In discussing the same subject, James Madison similarly wrote in 1825 (*id.* at 464):

> In our complex system of polity, the public will, as a source of authority, may be the will of the people as composing one nation; or the will of the States in their distinct and independent capacities; or the federal will, as viewed, for example, through the Presidential electors, representing, in a certain proportion, both the nation and the States.

In 1825 William Steele wrote a letter describing the account of the conflict over representation in the convention which he had received from Jonathan Dayton, who had been a delegate (III Farrand 468–469):

> When the details of the House of Representatives were disposed of, a more knotty point presented itself in the organization of the Senate. The larger states contended that the same *ratio*, as to states, should be common to both

branches of the legislature; or, in other words, that each state should be entitled to a representation in the Senate, (whatever might be the number fixed on,) in proportion to its population, as in the House of Representatives. The smaller states, on the other hand, contended that the House of Representatives might be considered as the guardian of the liberties of the *people,* and therefore ought to bear a just proportion to *their* numbers; but that the Senate represented the *sovereignty of the States,* and that as each state, whether great or small, was equally an independent and sovereign state, it ought, in this branch of the legislature, to have *equal* weight and authority; without this, they said, there could be no security for their equal rights—and they would, by such a distribution of power, be merged and lost in the larger states.

* * * * *

When the Convention had adjourned over to the next day, the delegates of the four smallest states, i.e., Rhode Island, Connecticut, New Jersey, and Delaware, convened to consult what course was to be pursued in the important crisis at which we had arrived. After serious investigation, it was solemnly determined to ask for a *reconsideration* the next morning; and if it was not granted, or if, when granted, that offensive feature of the Constitution could not be expunged, and the smaller states put upon an *equal footing* with the largest, we would secede from the Convention, and, returning to our constituents, inform them that no compact could be formed with the large states, but one which would sacrifice our sovereignty and independence.

In 1826, Madison wrote Andrew Stevenson concerning the confusion between national and federal gov-

ernment as applied to proposals before the constitutional convention (III Farrand 473–474):

> Will you pardon me for pointing out an error of fact into which you have fallen, as others have done, by supposing that the term, *national* applied to the contemplated Government, in the early stage of the Convention, particularly in the propositions of Mr. Randolph, was equivalent to *unlimited* or consolidated. This was not the case. The term was used, not in contradistinction to a limited, but to a *federal* Government. As the latter operated within the extent of its authority thro' requisitions on the confederated States, and rested on the sanction of State Legislatures, the Government to take its place, was to operate within the extent of its powers directly & coercively on individuals, and to receive the higher sanction of the people of the States. And there being no technical or appropriate denomination applicable to the new and unique System, the term national was used, with a confidence that it would not be taken in a wrong sense, especially as a right one could be readily suggested if not sufficiently implied by some of the propositions themselves. Certain it is that not more than two or three members of the Body and they rather theoretically than practically, were in favor of an unlimited Govt. founded on a consolidation of the States; and that neither Mr. Randolph, nor any one of his colleagues was of the number.

Madison similarly wrote N. P. Trist in 1831 (*id.* at 517–518):

> On recurring to the writings of Col. Taylor, it will be seen that he founds his imputation agst. myself and Govr. Randolph, of favoring a Consolidated National Governt on the Resolutions introduced into the Convention by the latter, in behalf of the Virga. Delegates, from

a consultation among whom they were the result. The Resolutions imported that a Govt. consisting of a *National* Legislre. Executive & Judiciary, ought to be substituted for the Existing Congs. Assuming for the term *National* a meaning coextensive with a Single Consolidated Govt. he filled a number of pages, in deriving from that source, a support of his imputation. The whole course of proceedings on those Resolutions ought to have satisfied him that the term *National* as contradistinguished from *Federal*, was not meant to express more than that the powers to be vested in the new Govt. were to operate as in a Natl. Govt. directly on the people, & not as in the Old Confedcy. on the States only * * *.

It ought to have occurred that the Govt. of the U.S. being a novelty & a compound, had no technical terms or phrases appropriate to it; and that old terms were to be used in new senses, explained by the context or by the facts of the case.

Some exulting inferences have been drawn from the change noted in the Journal of the Convention, of the word *National* into *"United States."* The change may be accounted for by a desire to avoid a misconception of the former, the latter being preferred as a familiar caption. That the change could have no effect on the real character of the Govt. was & is obvious; this being necessarily deduced from the actual structure of the Govt. and the quantum of its powers.

In 1833, Madison again denied that he had desired at the constitutional convention to form a consolidated government in which the States were the equivalent of provinces (III Farrand 529–530):

The Charge must rest on the term "National" prefixed to the organized Depts. in the

propositions of Mr. R. yet how easy is it to acct. for the use of the term witht taking it in a consolidating sense?

In the 1st. place. It contradistinguished the proposed Govt from the Confederacy which it was to supersede.

2. As the System was to be a new & compound one a nondescript without a technical appellation for it, the term "National" was very naturally suggested by its national features. 1. in being estabd. not by the authority of State Legs but by the original authy. of the people 2. in its organization into Legisl. Ex. & Judy. Departs.: and 3. in its action on the people of the States immediately, and not on the Govts. of the States, as in a Confederacy.

But what alone would justify & acct. for the application of the term National to the proposed Govt. is that it wd. possess, exclusively all the attributes of a natl. Govt. in its relations with other nations including the most essential one, of regulating foreign Commerce; with an effective means of fulfilling the obligs. & responsiby of the U.S. to other nations. Hence it was that the term natl. was at once so readily applied to the new Govt. and that it has become so universal & familiar.

In March 1836, Madison described the conflict over apportionment at the convention (III Farrand 538):

It is well known that the equality of the States in the Federal Senate was a compromise between the larger and the smaller States, the former claiming a proportional representation in both branches of the Legislature, as due to their superior population; the latter an equality in both, as a safeguard to the reserved sovereignty of the States, an object which obtained the concurrence of members from the larger States. But it is equally true, though but little reverted to as an instance of miscalculating

> speculation, that, as soon as the smaller States had secured more than a proportional share in the proposed Government, they became favourable to augmentations of its powers, and that, under the administration of the Government, they have generally, in contests between it and the State governments, leaned to the former.

Subsequently, Madison wrote a description of the constitutional convention in a preface to his notes on the convention (III Farrand 539):

> As the weakness and wants of man naturally lead to an association of individuals, under a common authority, whereby each may have the protection of the whole against danger from without, and enjoy in safety within, the advantages of social intercourse, and an exchange of the necessaries & comforts of life: in like manner feeble communities, independent of each other, have resorted to a Union, less intimate, but with common Councils, for the common safety agst. powerful neighbors, and for the preservation of justice and peace among themselves. Ancient history furnishes examples of these confederacies, tho' with a very imperfect account, of their structure, and of the attributes and functions of the presiding Authority. There are examples of modern date also, some of them still existing, the modifications and transactions of which are sufficiently known.
>
> It remained for the British Colonies, now United States, of North America, to add to those examples, one of a more interesting character than any of them: which led to a system without a precedent ancient or modern, a system founded on popular rights, and so combing. a federal form with the forms of individual Republics, as may enable each to supply the defects of the other and obtain the advantages of both—

2. THE VIEWS OF THOMAS JEFFERSON AND JAMES MADISON ON APPORTIONING STATE LEGISLATURES

a. Thomas Jefferson.—In June 1776, Jefferson wrote a Proposed Constitution for Virginia. It provided as to apportionment of the legislature (II Writings of Thomas Jefferson (Ford ed., 1893), p. 15):

> The number of representatives for each county or borough shall be so proportioned to the number of it's qualified electors that the whole number of representatives shall not exceed [300] nor be less than [150.] for the present there shall be one representative for every [400] qualified electors in each county or borough * * *.

The Senate was to be elected by the House of Delegates apparently from the State at large without regard to residence.

Jefferson's Notes on Virginia, which was written in 1781, discussed the then existing constitution of the State (III *id.* at 222):

> This constitution was formed when we were new and unexperienced in the science of government. It was the first, too, which was formed in the whole United States. No wonder then that time and trial have discovered capital defects in it.

Included in the defects which Jefferson found was (III *id.* at 222–223):

> 2. Among those who share the representation, the shares are very unequal. Thus the county of Warwick, with only one hundred fighting men, has an equal representation with the county of Loudon, which has 1746. So that every man in Warwick has as much influence in the government as 17 men in Loudon. * * *

> * * * It will appear at once that nineteen thousand men, living below the falls of the rivers, possess half of the senate, and want four members only of possessing a majority of the house of delegates * * *. These nineteen thousand, therefore, living in one part of the country, give law to upwards of thirty thousand living in another * * *.

In June 1783, Jefferson wrote another proposed constitution for Virginia. It provided as to the legislature that (III *id.* at 322–323):

> The number of delegates which each county may send shall be in proportion to the number of its qualified electors * * *.
>
> * * * If any county be reduced in its qualified electors below the number authorized to send one delegate, let it be annexed to some adjoining county.

Since the Senate was to have one senator for every 6 delegates in districts to be formed, it was likewise apportioned according to population.

A letter to Archibald Stuart, a life-long friend of Jefferson's and a member of the Virginia legislature, which was written on December 23, 1791, again stated Jefferson's ideas on changing the Virginia Constitution. He started his list of proposals (V *id.* at 410):

> I consider the following changes as important. Render the legislature a desirable station by lessening the number of representatives (say to 100) and lengthening somewhat their term, and proportion them equally among the electors * * *.

Later, in approximately 1794, Jefferson wrote Notes for a Constitution. He stated that (VI *id.* at 520):

> The legislature shall provide that returns be made to themselves periodically of the qualified voters in every county, by their name and quali-

> fication and from the whole number of qualified voters in the commonwealth such an Unit of representation shall from time to time be taken as will keep the number of representatives within the limits of 150 and 300 allowing to every county a representative for every Unit & fraction of more than half a Unit it contains.

Jefferson wrote in the margin that "[i]f a county has not an half Unit, add its votes to another." *Ibid.*

In 1816, a constitutional convention for Virginia was being considered. In a letter to Samuel Kercheval on July 12, Jefferson discussed his ideas on the subject in detail, although he made clear that they were not for publication. A considerable proportion of the letter was devoted to representation in the legislature (X *id.* at 37–41):

> At the birth of our republic * * * the abuses of monarchy had so much filled all the space of political contemplation, that we imagined everything republican which was not monarchy. We had not penetrated to the mother principle, that "governments are republican only in proportion as they embody the will of their people, and execute it." Hence, our first constitutions had really no leading principles in them. But experience and reflection have but more and more confirmed me in the particular importance of the equal representation then proposed.
>
> * * * * *
>
> But inequality of representation in both Houses of our legislature, is not the only republican heresy in this first essay of our revolutionary patriots at forming a constitution. For let it be agreed that a government is republican in proportion as every member composing it has his equal voice in the direction

> of its concerns (not indeed in person, which would be impracticable beyond the limits of a city, or small township, but) by representatives chosen by himself, and responsible to him at short periods, and let us bring to the test of this canon every branch of our constitution.
>
> In the legislature, the House of Representatives is chosen by less than half the people, and not at all in proportion to those who do choose. The Senate are still more disproportionate.
>
> * * * * *
>
> The true foundation of republican government is the equal right of every citizen, in his person and property, and in their management.
>
> * * * * *
>
> The sum of these amendments is, 1. General Sufferage. 2. Equal representation in the legislature.

On November 19, 1819, Jefferson wrote William King (Jefferson Papers, Library of Congress, vol. 216, p. 38616):

> Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified.

b. James Madison.—On August 23, 1785, Madison wrote John Brown, a friend and later a leader in Kentucky's quest for statehood and a Congressman and Senator, concerning legislative apportionment (I Letters and Other Writings of James Madison (1865), pp. 181–182):

> [P]roportioning of the representatives * * * may easily be done, in the first instance, either by comprising within each County an equal number of Electors, or by proportioning the number of representatives of each County to its number of Electors. The difficulty arises from

the disproportionate increase of electors in different Counties. There seem to be two methods only by which the representation can be equalized from time to time. The first is to change the bounds of the Counties; the second, to change the number of representatives allotted to them, respectively. As the former would not only be most troublesome and expensive, but would involve a variety of other adjustments, the latter method is evidently the best. Examples of a Constitutional provision for it exists in several of the States. In some it is to be executed periodically; in others, pro re nata. The latter seems most accurate and very practicable.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 29

THE MARYLAND COMMITTEE FOR FAIR REPRESENTATION, ET AL.,
Appellants,

v.

J. MILLARD TAWES, GOVERNOR, ET AL.,
Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF ON BEHALF OF APPELLEES

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT S. BOURBON,
Assistant Attorney General
of Maryland,
Suite 1200, One Charles Center,
Baltimore 1, Md.,
For Appellees.

The Daily Record Co., Baltimore 3, Md.

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IN THE

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No. 29

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Appellants,

v.

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Appellees.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND

BRIEF ON BEHALF OF APPELLEES

OPINIONS OF THE COURT BELOW

Appellees accept Appellants' statement outlining the Opinions of the Court below.

JURISDICTION

Appellants allege that the Supreme Court of the United States has jurisdiction pursuant to 28 U.S.C. 1257(2) and 28 U.S.C. 2101 (c).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves:

(1) Section 1 of the Fourteenth Amendment to the Constitution of the United States, containing the equal protection and due process clauses, printed in Appendix A, Appellants' Brief, page 76; and

(2) Section 2 of Article III of the Maryland Constitution, printed in Appendix A, Appellants' Brief, page 76.

QUESTION PRESENTED

Does the Fourteenth Amendment to the Constitution of the United States require that the membership of the Senate of the State of Maryland "be based on, or reasonably related to, the present population" of the various political subdivisions of the State?

STATEMENT OF THE CASE

The sole question properly presented by this appeal is the validity, consistent with the Fourteenth Amendment to the Constitution of the United States, of the present apportionment plan of the State Senate of Maryland, as embodied in Article III, Section 2, of the Maryland Constitution. Appellants in the trial court conceded that, at least for the present, the somewhat recently enacted stopgap legislation regarding the composition of the Maryland House of Delegates (Chapter 1, Acts of the 1962 Special Session of the General Assembly of Maryland, also known as Article 40, Section 42, Annotated Code of Maryland, 1962 Supplement, printed in Appendix A, Appellants' Brief, page 77) satisfied the demands of the Equal Protection Clause of the Fourteenth Amendment. In the Court of Appeals of Maryland, Ap-

pellants revised their position and alternatively prayed that the General Assembly be treated as a "whole". In their Brief in this Court, Appellants allege as their second "Question Presented" the question of "total representation" as falling short of the demands of the Fourteenth Amendment.

In its Opinion of September 25, 1962, reported at 229 Md. 406, 184 A. 2d 715, printed at R. 162, 164, the court stated:

> "No question is presented as to the validity of the 'stopgap' legislation or the reapportionment of the House of Delegates."

And in his dissent to the above-quoted majority opinion, Chief Judge Brune confirmed this when he said, for the minority (R. 176):

> "It is true that the apportionment of the House is not under attack on this appeal and no question with regard thereto is now before us."

And the above is further confirmed by the language of the trial court's opinion (R. 114), where Judge Duckett states:

> "... Petitioners have conceded that the Lower House has been legally reapportioned according to population."

Consequently, it is clear that Appellants attempt here to raise obliquely what they cannot raise directly; the question of proper apportionment in the Maryland House of Delegates or of "total representation" in the General Assembly is not now before this Court.

Insofar as this appeal is concerned, the gravamen of Appellants' claim is set forth in Paragraph 22 of the Bill of Complaint (R. 8), to wit:

> "Section 1 of the Fourteenth Amendment requires that representation in the State Senate of Maryland be based on, or reasonably related to, the present population of the counties and the City of Baltimore, and that the total number of members in that body to which the counties of Anne Arundel, Baltimore, Montgomery, Prince George's and the City of Baltimore are entitled is 22, instead of the 10 Senators through whom they are now represented in that body (assuming no increase in its present membership of 29 Senators)."

Paragraph 14 of Appellees' Answer (R. 91, 92) denied the above allegations and affirmatively stated, *inter alia*, that representation in the Maryland Senate need not be based on or reasonably related to the present population of the counties and Baltimore City.

Historically and theoretically, the two houses of the Maryland General Assembly were designed to represent different segments or ideologies present in the State. The House of Delegates, according to the Constitution of 1776,[1] was comprised of four delegates from each county, plus two from Annapolis and Baltimore Town (then a part of Baltimore County). The Constitution of 1851 and each succeeding Constitution provided for membership in the House of Delegates to be based generally on a population ratio.

The Constitution of 1851[2] provided that each county should be allotted representation generally based on population, as determined by the census of 1860, subject, however, to the provision that no county should have less than two delegates.

---

[1] Articles II, IV and V (Niles, *Maryland Constitutional Law*, Page 360).

[2] Article III, Sec. 3 (Niles, *Maryland Constitutional Law*, Page 406).

Similarly, the Constitution of 1864[3] apportioned the House on the basis of population, with one delegate for the first 5,000 persons, and thereafter each delegate to represent a graduated scale of the population.

The Constitution of 1867[4] originally allotted seats in the House based upon a graduated scale of population, permitting, however, each county or legislative district of Baltimore City, regardless of population, to have a minimum of two delegates.[5]

By contrast, the Senate of Maryland under the Constitution of 1776[6] was composed of 15 Senators, six from the Eastern Shore and nine from the Western Shore, chosen by an electoral college of 40 members. Each county supplied two electors and Annapolis and Baltimore Town were allotted one each.

Starting with the Constitution of 1851,[7] each county was allotted one Senator, as was Baltimore City (Baltimore City for the first time having been made a separate and independent political subdivision).

---

[3] Article III, Sec. 4 (Niles, *Maryland Constitutional Law*, Page 442).

[4] Article III, Sec. 3 (Niles, *Maryland Constitutional Law*, Page 485).

[5] It is interesting to note that in Article III, Sections 3, 4 and 5 of the Constitution of 1867, prior to amendment, in establishing and providing for the members in the House of Delegates, the word "population" itself is used on at least ten occasions. This clearly indicates that the framers of the Constitution intended that the House be based upon, or reasonably related to, population. Also of interest is the fact that by Section 6 of Article III of the Constitution of 1867, before amendment, members of the House were elected for a term of two years. (This was changed by the quadrennial election amendment of Article XVII of the Maryland Constitution in 1922.) By contrast, in Article III, Section 2 of the Constitution of 1867, before amendments, the word "population" is not used.

[6] Articles XIV, XV and XVI of the Maryland Constitution (Niles, *Maryland Constitutional Law*, Pages 362, 363).

[7] Article III, Section 2 (Niles, *Maryland Constitutional Law*, Page 406).

The Constitution of 1864[8] continued to allot one Senator to each county, but also permitted one each from the three legislative districts of Baltimore City. This provision was re-adopted in the Constitution of 1867[9] and has remained in force, with the exception of Baltimore City which received an additional legislative district in 1900 and two additional legislative districts in 1922, subsequent to the annexation of portions of Baltimore County and Anne Arundel County in 1918 (Chapter 82, Laws of 1918).[10]

There seems to be some confusion regarding the status of the City of Baltimore and it is therefore deemed desirable to discuss briefly its history. Although it was chartered in 1796 (Acts of 1796, Chapter 68), it was by virtue of the provisions of the Constitution of 1851, that the City of Baltimore was recognized to be a separate, distinct and independent political subdivision of the State.[11] By virtue of the provisions of Article XI of the Constitution of 1867, Baltimore City was granted the constitutional right to maintain its own local government, subject, however, to control by the General Assembly.[13] In this respect the governmental functions of Baltimore

---

[8] Article III, Section 3 (Niles, *Maryland Constitutional Law*, Page 442).

[9] Article III, Section 2 (Niles, *Maryland Constitutional Law*, Page 485).

[10] On Page 51 of the Appellants' Brief there is quoted portions of Governor Ritchie's statement relative to increased representation in the Legislature for Baltimore City. Unfortunately, the Appellants have quoted out of context and the full sentence of the statement of Governor Ritchie to the General Assembly is as follows:

> ". . . The growth of population in Baltimore *by reason of extensions of its territory and many other considerations*, entitles the city to increased representation in both houses of the General Assembly. . . .". (Emphasis supplied.)

[11] Scharf, History of Baltimore City & County (1881), pp. 62-63, Hall, History of Baltimore, Vol. 1, p. 151, *Wright v. Hammer*, 5 Md. 370; *State v. Shillinger*, 6 Md. 449; cf. *State v. Dashiell*, 6 H. & J. 268.

[13] See *Pressman v. D'Alesandro*, 211 Md. 50, 57, 125 A. 2d 35.

City were placed in a unique position comparable in the United States only to that of the City of St. Louis.

The Appellees also wish to emphasize that the use of a combination of certain counties and Baltimore City for purposes of comparison is an artificial attempt to justify the Appellants' position. It must be remembered that the said political sub-divisions, with the exception, perhaps, of Baltimore City and County, in many respects have no common economic, social or other basis for comparison. While it is conceded that each of the four counties and Baltimore City are rapidly growing urban areas, nevertheless, large portions of each of those counties are devoted to farming and other rural pursuits. Therefore, the urban-rural cleavage stressed by the Appellants exists within the very counties which the Appellants claim are adversely affected by the urban-rural conflict. Likewise, for example, the people of Baltimore City, because of its industrial concentration, do not share the problems of the tobacco farmers of Prince George's and Anne Arundel Counties or those of the dairy farmers in the northern part of Baltimore County or western part of Montgomery County. It is therefore urged that these combinations are artificial and may at times create an illusory impression.

SUMMARY OF ARGUMENT

I. *Maryland Senate apportionment does not invidiously discriminate against Appellants and others similarly situated.*

While *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, determined jurisdiction, justiciability and standing to sue, it decided those various questions and nothing more. Neither did it decide nor indicate what constitutes unconstitutional apportionment, nor whether population is the *sole* permissible basis for legislative apportionment under the equal protection clause.

Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, does not decide questions relating to composition of the state or federal legislatures, nor does it lay down "basic ground rules implementing *Baker v. Carr*". See Opinion of Mr. Justice Douglas, speaking for the Court, 83 S. Ct. at 807, and concurring opinion of Mr. Justice Stewart, at 809. Further, it does nothing to limit the application of *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1, 93 L. Ed. 3, wherein this Court spoke of not denying a state "the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses".

The ruling of the Court of Appeals of Maryland below (229 Md. 406, 184 A. 2d 715), wherein it held that historical precedent furnishes justification and constitutes a rational basis for the present apportionment of the Maryland Senate, is supported in *Caesar v. Williams*, 84 Ida. 254, 371 P. 2d 241; *Sobel v. Adams*, 208 F. Supp. 316; *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368; *Nolan v. Rhodes*, decided June 12, 1963, 218 F. Supp. 953; *Daniel v. Davis*, decided June 28, 1963, F. Supp. ; and *Jackman v. Bodine*, 78 N.J. Super. 414, 188 A. 2d 642. See also the dissenting opinions in *Sincock v. Duffy*, 215 F. Supp. 169 and *Mann v. Davis*, 213 F. Supp. 577.

Interests other than population must be taken into account in the apportionment of the Maryland Senate, where as in this case, the apportionment of the House of Delegates is not under attack, nor in question. See *Lisco v. McNichols*, 208 F. Supp. 471, recognizing as a relevant factor representation of industrial interests; *Sobel v. Adams, supra*, representation of general regional interests; *Caesar v. Williams, supra*, protection of sparsely settled areas; *Levitt v. Maynard*, 104 N.H. 243, 182 A. 2d 897, recognizing as "rational," wealth and the proposition

of total taxes paid by a district; *W.M.C.A., Inc. v. Simon, supra*, a state apportionment plan "of historic origin" and "not irrational", which "clearly gives weight to population within the state's counties which forms a basis for the ingredient of area, accessibility and character of interest", and Tyler, *Court Versus Legislature*, 27 Law and Contemporary Problems, 390, 391, 393, economic interests.

Under the Maryland plan, history and tradition may be found to be a rational exercise of state policy in connection with the apportionment here under attack. The state is to be allowed every reasonable latitude and the Maryland Constitution will not ". . . be set aside if any state of facts reasonably may be concerned to justify it . . .". *McGowan v. State of Maryland*, 366 U.S. 420, 81 S Ct. 1101, 6 L. Ed. 2d 393.

II. *The Federal Plan analogy is applicable to the Maryland Senate.*

The evolution of the Maryland Senate finds analogy and precedent in the Federal Plan, insofar as the United States Senate is concerned. Based upon compromise, as was the continued expansion of the Federal Union, Baltimore City's periodic apportionment of additional Senators, because of that city's unique position, geographically, as a great port city, industrially and otherwise, represents a rational exercise of State policy.

The allocation to each county of a single Senator, on a nonpopulation basis, is rational where, as found by the court below, the counties in Maryland "have always possessed and retained distinct individualities" (R. 166). See *W.M.C.A., Inc. v. Simon, supra*.

The counties, in relation to the states, may be compared to the states in relation to the Federal Government. Only the original 13 states may have possessed sovereignty and,

in reality, none of them possess now many, if any, true attributes of such sovereignty.

Appellèes question how a defense may be made of a federal Senate system which results in a gross dilution of individual voting power up to a ratio of 75 to 1, over twice the maximum complained of here. Is the rationale of *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884, applicable to the present apportionment of the United States Senate, under Amendment V of 'the Bill of Rights'.

The Federal analogy finds support in *Nolan v. Rhodes, supra.* And see the dissenting opinion of Judge Layton in *Sincock v. Duffy, supra.*

The Maryland Senate system served as a model in many respects for the Federal Senate. *The Journal of the Constitutional Convention*, G. P. Putnam Sons, 1903, page 202; No. 63, *The Federalist Papers.*

Recognition of Baltimore City in additional Senate representation constituted an exception to the so-called Federal Plan rather than an abandonment of it.

The recognition of the many factors surrounding Baltimore City's unique position in Maryland is a reasonable and rational State policy. Its Senate apportionment was increased because of its size. Bell, *The Legislative Process in Maryland.*

The compromise so evident in the evolution of the Maryland Senate system, which gave representation to the State's varied and diverse interests, reflected the State's collective judgment, from time to time, as to what best served and suited those interests, is rational and should be upheld.

III. *The General Assembly as a whole.*

The alleged malapportionment of the General Assembly "as a whole" is not now before the Court. (See R. 114, 162, 164, 176.)

Representative government, whether upon the State or Federal level, has clearly recognized the lesser unit of government as a basis for political representation.

The so-called "principle of majority rule", as advanced by Appellants, has never been a part of either the Federal or state systems; the foundation stone of democratic government is the protection of minorities from the "tyranny of the majority". See the dissenting opinion of Mr. Justice Frankfurter, in *Baker v. Carr* (369 U.S. at 301); *Nolan v. Rhodes, supra*, 218 F. Supp. at 958.

Baltimore City, together with Baltimore County, or the four populous counties of Baltimore, Anne Arundel, Prince George's and Montgomery together, might, if given the representation urged by Appellants, create a new malapportionment far worse than that here complained of. Can such reorientation assure any "proper diffusion of political initiative"?

If this Court should inquire into the question of whether the Maryland governmental structure as presently constituted actually possesses "responsiveness", it should be noted that the role of a strong Governor, as Maryland has had in recent years, with his base of popular support, tends to offset some discrepancy in Senate representation.

ARGUMENT

I.

MARYLAND SENATE APPORTIONMENT DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST APPELLANTS AND OTHERS SIMILARLY SITUATED.

Unquestionably, the immediate point of beginning of this and other current reapportionment suits in the landmark decision of this Court in *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663. There, appellants, qualified voters of the State of Tennessee, sued in the United States District Court for the Middle District of Tennessee, alleging deprivation of federal constitutional rights, in that the state apportionment statute governing members of the General Assembly of Tennessee among the state's 95 counties denied them the "equal protection of the laws accorded them by the Fourteenth Amendment to the Constitution of the United States by virtue of the debasement of their votes . . .". This Court, speaking through Mr. Justice Brennan (at 369 U.S. 197), stated:

> "In light of the District Court's treatment of the case, we hold today only (a) that the court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) because appellees raise the issue before this Court, that the appellants have standing to challenge the Tennessee apportionment statutes."

Mr. Justice Stewart, concurring (369 U.S. at 265-266), stated:

> "The Court today decides three things and no more: '(a) that the Court possessed jurisdiction of the subject matter; (b) that a justiciable cause of action is stated upon which appellants would be entitled to appropriate relief; and (c) . . . that the appellants have standing to challenge the Tennessee apportionment statutes'.

"The complaint in this case asserts that Tennessee's system of apportionment is utterly arbitrary — without any possible justification in rationality. The District Court did not reach the merits of that claim, and this Court quite properly expresses no view on the subject. Contrary to the suggestion of my Brother Harlan, the Court does not say or imply that 'state legislatures must be so structured as to reflect with approximate equality the voice of every voter'. Post, p. 332. The Court does not say or imply that there is anything in the Federal Constitution 'to prevent a State, acting not irrationally, from choosing any electoral legislative structure it thinks best suited to the interests, temper and customs of its people'. Post, p. 334. And contrary to the suggestion of my Brother Douglas, the Court most assuredly does not decide the question, 'may a State weight the vote of one county or one district more heavily than it weights the vote in another?'. Ante, p. 244.

"In MacDougall v. Green, 335 U.S. 281, the Court held that the Equal Protection Clause does not 'deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available to the former'. 335 U.S. at 284. In case after case arising under the Equal Protection Clause the Court has said what it said only last Term — that 'the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others'. McGowan v. Maryland, 366 U.S. 420, 425. In case after case arising under that Clause we have also said that 'the burden of establishing the unconstitutionality of a statute rests on him who assails it'. Metropolitan Casualty Ins. Co. v. Brownell, 294 U.S. 580, 584.

"Today's decision does not turn its back on these settled precedents. I repeat, the Court today decides only: (1) that the District Court possessed jurisdic-

tion of the subject matter; (2) that the complaint presents a justiciable controversy; (3) that the appellants have standing."

Neither *Scholle v. Hare*, 369 U.S. 429, 82 S. Ct. 910, 8 L. Ed. 2d 1, "remanded to the Supreme Court of Michigan for further consideration in the light of *Baker v. Carr* . . ." or *W.M.C.A., Inc., et al. v. Simon, Secretary of State of New York, et al.*, 370 U.S. 190, 919, 82 S. Ct. 1234, 8 L. Ed. 2d 430, remanded on the same basis, can be said to do other than confirm the narrowness of the holding in *Baker v. Carr, supra*, notwithstanding Appellants' protestations to the contrary (Brief, pages 15, 29).

Certainly Mr. Justice Stewart was of the opinion, in staying the order for apportionment in *Scholle*, that ". . . the issues decided by the Michigan Supreme Court are new issues; ones that were not decided in *Baker v. Carr*." See Baltimore Morning Sun, July 28, 1962, page 5; Washington Evening Star, July 28, 1962, page 5 (R. 170). *Baker* neither decided nor indicated what constitutes unconstitutional apportionment. Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of Baker v. Carr*, 61 Mich. L. Rev. 107, 112. Nor does *Baker* answer the question of whether population is the *sole* permissible basis for legislative apportionment under the equal protection clause. Maurice H. Merrill, *Blazes through the Thicket of Reapportionment*, 16 Oklahoma L. Rev. 59, 63. Even Robert B. McKay's *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 Mich. L. Rev. 645, and Jo Desha Lucas' *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 Mich. L. Rev. 711, admit the narrowness of *Baker v. Carr* while asserting, as do Appellants here, that it must have meant much more.

As the Court stated in *W.M.C.A., Inc. v. Simon*, 208 F. Supp. 368, 372, 373 (on remand):

> "... we are unable to premise an invalidity of the provisions of the State of New York upon the Baker v. Carr determination by reason of the absence of applicable indicia. ... Counsel for plaintiffs has conceded that 'there is nothing in the explicit opinion of Baker against Carr which would indicate how ultimately the cases were to be resolved on the merits', although counsel contended that there was 'much in Baker against Carr which is implicit' ... This Court is unable to discern this result for which plaintiffs here argue."

See *Clark v. Carter*, 218 F. Supp. 448, 452 (Kentucky Congressional redistricting statute); *Caesar v. Williams*, 84 Ida. 254, 371 P. 2d 241, 244; *Sobel v. Adams*, 208 F. Supp. 316.

Gray v. Sanders, 372 U.S. 368, 83 S. Ct. 801, 9 L. Ed. 2d 821, decided on March 18, 1963, cited by Appellants as involving a principle "equally applicable here" (Brief, page 42), struck down the Georgia Unit Vote System as used by that state for counting votes in primary elections for state-wide offices. Mr. Justice Douglas, speaking for the Court, set forth in unmistakably clear language (83 S. Ct. at 807):

> "Nor does the question here have anything to do with the composition of the state or federal legislature. And we intimate no opinion on the constitutional phases of that problem beyond what we said in Baker v. Carr, supra. *The present case is only a voting case.*" (Emphasis supplied.)

Mr. Justice Stewart, whom Mr. Justice Clark joined, concurring, said (83 S. Ct. at 809):

> "This case does not involve the validity of a State's apportionment of geographic constituencies from

> which representatives to the State's legislature assembly are chosen, nor any of the problems under the Equal Protection Clause which such litigation would present. We do not deal here with 'the basic ground rules implementing Baker v. Carr'. This case, on the contrary, involves statewide elections of a United States Senator and of state executive and judicial officers responsible to a statewide constituency. Within a given constituency, there can be room for but a single constitutional rule — one voter, one vote. United States v. Classic, 313 U.S. 299, 61 S. Ct. 1031, 85 L. Ed. 1368."

The county unit system, of course, no longer prevails in Maryland, as of the judgment of the United States District Court for the District of Maryland entered May 10, 1963, in *Maryland Committee for Fair Representation, et al. v. J. Millard Tawes, et al.*, Civil Action No. 14452 (consent decree in which Maryland's Attorney General participated, on behalf of Defendants).

Presumably, for the reverse has nowhere been shown nor has it even been suggested by Appellants, *Gray v. Sanders, supra*, does nothing to overrule or limit the application of *MacDougall v. Green*, 335 U.S. 281, 69 S. Ct. 1, 93 L. Ed. 3, where this Court said:

> "To assume that political power is a function exclusively of numbers is to disregard the practicalities of government. Thus, the Constitution protects the interests of the smaller against the greater by giving in the Senate entirely unequal representation to populations. It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, in view of the fact that the latter have practical opportunities for exerting their political weight at the polls.

> not available to the former. The Constitution — a practical instrument of government — makes no such demands on the States." (Quoted from approvingly in Mr. Justice Stewart's concurring opinion in *Baker v. Carr, supra*, 369 U.S. at 265, 266.)

And see *South v. Peters*, 339 U.S. 276, 70 S. Ct. 641, 94 L. Ed. 834, affirming the principle of *MacDougall*, but perhaps in turn silently overruled by *Gray* on other grounds. See Dissenting Opinion of Mr. Justice Harlan in *Gray, v. Sanders, supra* (83 S. Ct. at 809).

While it may be true, as stated by Chief Judge Brune in his dissent to the latest opinion below (R. 173), that *Baker v. Carr* could not well have determined the exact point at which protection against the debasement or dilution of voting rights through state legislative apportionment of representation will be afforded in any specific case; nonetheless, it certainly can be said that an absence to date of any "guidelines for formulating specific, definite, wholly unprecedented remedies" has resulted in a wide divergence of opinion and action among the various state and federal courts and among the judges of those courts, not only as to right but as to remedy. See Mr. Justice Frankfurter's dissenting opinion in *Baker* (369 U.S. at 267). Because of a lack of guiding *judicial* principles upon which to rely, perhaps too many courts may find it considerably more difficult to determine what type of discrimination, in legislative apportionment matters, invidiously violates the commands of the Fourteenth Amendment than to determine what *does not*. Surely any attack such as the present one, striking as it does at the very taproots of the Maryland political and governmental system, ought not to be sustained on such a basis.

The nub of the Court of Appeals' ruling here appealed from (229 Md. 406, 184 A. 2d 715) (R. 162) is that popula-

tion considerations need not be taken into account in determining whether the Maryland Senate apportionment plan invidiously discriminates in violation of the Fourteenth Amendment and that historical precedent furnishes justification and constitutes a rational basis for the present apportionment of the Senate. Appellants' position, earlier, apparently was that the Senate should be based strictly on population. They now seem to have retreated somewhat to a basis "partly on population and partly on area" (R. 122, Brief, page 72). However, population should remain the "strongly dominant factor", in their view (Brief, page 72).

The Maryland ruling finds support in the following cases:

Caesar v. Williams, supra, decided on April 3, 1962, (rehearing denied on May 8, 1962). In that case two Idaho apportionment statutes were attacked by persons claiming that neither provided substantial equal representation for the residents of the more populous counties in the House of Representatives. The trial court upheld the claim of unconstitutionality, but the appellate court reversed and stated as follows (371 P. 2d at 247):

> "It is clear that the constitutional requirement of one representative for each county, superimposed on the population requirement of the statute, will lead to discrepancies between the number of people who will be represented by each individual representative constituting the house of representatives, on a purely numerical basis. Respondent has forcefully pointed out such discrepancies, particularly by the exhibit in his complaint. Clark County, with a 1960 population of 915 persons, and Camas County with a 1960 population of 917, each is entitled to one representative under both the 1951 act and the 1933 act; Elmore County, with a 1960 population of 16,719, and Cassia County, with a 1960 population of 16,121, each

likewise is entitled to only one representative under the 1951 act; whereas under the 1933 act each would be entitled to two representatives. These examples illustrate the extremes of the discrepancies in population representation. But, is such gross disparity so arbitrary and capricious that the 1951 act and the 1941 act must be stricken down as unconstitutional, in favor of the previous 1933 act? Also, is this disparity created by the act itself, or created by the constitution? Another question is whether the disparity is the result of application of a set of facts and circumstances for which the legislation was not designed? Also, in such disparity violative of the equal protection clauses of Idaho's Constitution, Art. I, sec. 2 and of the United States Constitution, Fourteenth Amendment?

"The constitutional limitations of one representative per county and a maximum of not to exceed three times the number of senators immediately destroys any possibility of representation based solely on a per-capita or per-voter basis. Attempting to compare the representation afforded by the constitutional requirement of one representative per county to the representation to be afforded on a per capita basis is impossible. . . .

"The members of the Idaho Constitutional Convention were fully cognizant of the impossibility of mathematical equality in election of representatives by reason of this constitutional requirement of one representative per county. . . ."

This decision is of extreme importance because of the fact that Idaho, like Maryland, constitutionally elects one senator for each county, based upon a geographical distribution of political strength. Article III, Section 2, Idaho Constitution. . .

In *W.M.C.A., Inc. v. Simon, supra,* on remand, the court upheld a New York apportionment plan which, *inter alia,*

allows each county in the state, with one exception, at least one assemblyman in the State Assembly. Depending upon population and on a "ratio" basis, representation is increased. See 208 F. Supp. at 371, 383. The Senate is based substantially on population. Schuyler County, with a population of 15,044, is entitled to one representative, while Suffolk County, with a population of 666,784, is entitled to three, a variation of almost 15 to 1 between them. See 208 F. Supp. at 383, 384. The court held there (208 F. Supp. at 376) that the apportionment provisions were "of historic origin" and "not irrational"; the plan "clearly gives weight to population within the state's counties which forms a basis for the ingredients of area, accessibility and character of interest".

The court further said that the apportionment scheme had "factors adapted to the needs of the State of New York constituted as it is of urban, suburban and rural areas, with congestion of population in one spot, with areas of lesser intensity in other locations and with sparsely settled spaces more remote from the centers of population. All ingredients are present, there is no arbitrariness in formulae or in the result thereof."

In *Sobel v. Adams, supra*, a proposed Florida apportionment plan was approved which resulted in Dade County with 19% of the state population (or 935,047) obtaining but one of 46 state senators. The State House of Representatives is apportioned substantially on a population basis.

The court was of the opinion (at 321) that:

> "It is not required that, in all events, either or both houses of a bicameral legislature must be apportioned upon a population basis of either exact or approximate equality of representation. . . . It is our considered view that the rationality of a legislative ap-

portionment may include a number of factors in addition to population."

In dealing with the House representation question, the court said (at 322, 323):

> "The zeal of the advocates of strict apportionment by a rigid population allocation fails to convince us that the results so achieved would be rational. The plan proposed by the legislature of a representative from each county with additional representatives distributed on a basis of a population ratio seems to us to provide a formula which secures the desirable county representation and a reckoning, to the extent required, of the population factor."

Apropos of the State Senate, the court stated (at 323):

> "Because such a large portion of the legislative function deals with special acts applicable only to a single county or municipality, we think it would be unwise and illogical to provide for more than one Senator from any county, except perhaps from Dade which enacts its own local legislation. Under the plan before us the House of Representatives would be apportioned by a formula in which population is heavily weighted. Because of this we think that population need not be a major factor in the apportionment of the other House. Such apportionment must, however, be made upon a rational basis."

In analyzing the Senate districting scheme in respect of any possible "crazy quilt" attributes, it might possess, the court indicated (at 323, 324):

> "It is possible, but we refrain from saying probable, that some of the county alignments or absence of alignments were the result of the political necessity of concessions in order to procure the passage of the measures we have before us. Disparities and departures from the plan may be pointed out but these are mainly of a de minimis nature and are not

such as, in our judgment, render the plan invidiously discriminatory or rob it of its rationality. . . . What is urban and what is rural, so far as a county is concerned, may depend upon a point of view."

In *Nolan v. Rhodes*, decided June 12, 1963, 218 F. Supp. 953, the court sustained an Ohio constitutional apportionment plan involving the state House of Representatives, established on a basis partly of area and partly on population. The state Senate was not involved.

Commenting upon a system guaranteeing to each county one representative in the House and upholding it against an attack on equal protection grounds, notwithstanding a ratio maximum of almost 15 to 1, the court said (at 957):

"There does not seem to be much reason for a bicameral legislature if both houses are required to be apportioned on the same basis."

Daniel v. Davis, decided June 28, 1963, by a statutory District Court for the Eastern District of Louisiana, upheld a Louisiana apportionment plan for the House of Representatives (which reaches an 8 to 1 disproportion ratio) where each parish in Louisiana, with one exception, received a representative, as does each of the 17 wards in New Orleans. The remaining seats in the House are distributed according to the Method of Equal Proportions.

In *Jackman v. Bodine*, 78 N.J. Super. 414, 188 A. 2d 642, the New Jersey apportionment system, which allows one Senator to each county regardless of its population (resulting in a maximum disproportion ratio of 19 to 1) and allocates House members on a population basis, was sustained, the court saying (188 A. 2d at 650):

"The fact that the present system of representation in our State Senate does not attempt to equalize disproportionate population differences between the vari-

> ous counties . . . is not conclusive on the ultimate question of whether or not the system discriminates invidiously. To be sure, where the make up of one branch of state government completely disregards population as a factor in representation, *some* discrimination *must* result. But it is only when the discrimination is invidious or when the discrimination reflects *no* policy that the State legislative branch must reorganize itself or be reorganized."

In *Jackman*, the plaintiffs had argued as Appellants here have below that the "Fourteenth Amendment *does* require consideration of population differentials *re* senatorial districts. . ." (at 645).

On June 22, 1962, a three-judge Federal District Court reconsidered *Baker v. Carr, supra*, in light of the Supreme Court action remanding the case for further proceedings. See 206 F. Supp. 341. At the time of the reconsideration, Tennessee had recently enacted legislation reapportioning the Tennessee Legislature. The Tennessee Constitution, Article II, Section 6, requires that the ". . . number of senators which, at the several periods of making the enumeration, be apportioned among the several counties or districts according to the number of qualified electors in each . . .". The court found that the apportionment of the house resulted in the termination of the "most glaring inequities", but there still remained some inequities in that the urban voters were still under-represented. The court stated (at 345):

> ". . . One reason for the rule embodies in the Constitution of the state is to afford a measure of protection to governmental units or subdivisions of the state not having a sufficient number of voters to equal the full ratio but yet having a substantial population and possessing significant and substantial interests in state legislative policy. Such a state plan for distribution of legislative strength, at least in one house of

a bicameral legislature, cannot, in our opinion, be characterized as per se irrational or arbitrary. And we think the same conclusion follows if this principle is extended in the same legislative house of a bicameral legislature so as to afford substantial representation to smaller counties by classifying or arranging them in floterial districts. We find no basis for holding that the Fourteenth Amendment precludes a state from enforcing a policy which would give a measure of protection and recognition to its less populous governmental units. . . ."

The court, however, found that the redistricting of the state senate required by the constitutional mandate was "devoid of any standard or rational plan of classification". The court went on to state (at 346):

". . . It creates thirty-three senatorial districts for election of the constitutionally prescribed number of thirty-three senators, making no pretense to equality or substantial equality in numbers of qualified voters. Nor are the districts created by the Act equal or even remotely equal in area. There are also wide variations in the numbers of counties lumped together in the respective districts. The conclusion is irrestible that the apportionment wrought by the 1962 Act with respect to the Senate can only be described, to use the apt phrase of Mr. Justice Clark in his concurring opinion in this case, as a 'crazy quilt'. *It is inexplicable either in terms of geography or demography. Neither can it be explained upon the theory that it seeks to give equal or substantially equal representation to governmental subdivisions or units.* . . ." (Emphasis supplied.)

The court, by its reasoning, clearly laid down the rule that the equal protection of the laws is gratified if at least one house of the Tennessee Legislature is based upon or reasonably related to qualified voters without regard to other factors, when it said (at 349):

> ". . . We find in the context of this case that equal protection requires that such condition be eliminated and that apportionment in at least one house shall be based, fully and in good faith, on numbers of qualified voters without regard to any other factor."

And, in respect of the proposition stated in *Baker v. Carr*, on remand, see *Toombs v. Fortson*, 205 F. Supp. 248, 257, where the court said:

> "Granting the plaintiffs' petition for declaratory judgment, we determine and hold that so long as the Legislature of the State of Georgia does not have at least one house elected by the people of the State apportioned to population, it fails to meet constitutional requirements."

As indicated in our Statement of the Case, (infra, pp. 2-3), not only is the makeup and proper apportionment of the Maryland House of Delegates not in question here nor before this Court, but it has been conceded by Appellants below to be properly apportioned according to population, on the basis of the so-called stopgap legislation of 1962. Thus, if this Court is to hold that at least one house of a state assembly must be elected on a purely population basis, as have *Baker* and *Toombs*, and others, the present apportionment of the Maryland Senate must, we submit, be considered in conjunction with a House of Delegates which, for purposes of this case is properly apportioned according to population.

And apropos of Appellants' position herein, which, despite some considerable backing and filling, must be said to be that the Senate of Maryland should be held to a tight or strict population standard, only *slightly* different from that of the House of Delegates, at the most, and if at all, the court in *Toombs v. Fortson*, said (at 257):

> "It is urged by the plaintiffs here that in its decision in the case of *Scholle v. Hare, supra*, 82 S. Ct. 910, the court in effect decided that constitutional standards required that not only one House but both Houses of a bi-cameral legislature be related to population. . . .
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> "There is some basis for plaintiffs' argument in this direction, especially when we consider that in Mr. Justice Douglas' dissenting opinion in the United States Supreme Court's decision in *MacDougall v. Green*, he and his colleagues, Justices Black and Murphy, seem to have said that the mere fact that the Federal Constitution itself sanctions inequalities because of the structure of the United States Senate, is no justification for a state also to create inequalities by having similar differences. See dissenting opinion, Mr. Justice Douglas, *MacDougall v. Green*, 335 U.S. 281, at page 287, 289. However, that may be, we do not find any authoritative decision by the Supreme Court that causes us to require that in order to give the plaintiff his constitutional rights the state legislature must be constituted of two Houses, both of which are elected according to population."

Scholle v. Hare, 367 Mich. 176, 116 N.W. 2d 350, on remand, decided by a badly split court, struck down a Michigan Senatorial apportionment scheme. As indicated (Appellees' Brief, page 14), Mr. Justice Stewart stayed the judgment on the ground that issues in that case were "ones that were not decided in Baker v. Carr".[14]

In *Sweeney v. Notte*, ... R.I. ....., 183 A. 2d 296, the Rhode Island Supreme Court struck down a state apportionment plan which limited the House of Representatives to 100 but which secured representation to each munic-

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[14] Quite correctly, *Baker v. Carr, Legislative Reapportionment*, at 72 Yale L. J. 968, 1003, footnote 167, concludes that *Scholle* was reached by the Michigan Court, on remand, solely on the basis of State precedent, upon which is superimposed the federal requirement of equal protection of the laws.

ipality, the court holding that such "taken together" results in a denial of equal protection.[15]

In *Moss v. Burkhart*, 207 F. Supp. 885, a three-judge statutory court struck down the Oklahoma apportionment system, which permitted, *inter alia*, a disproportionate ratio of 12 to 1 in the State Senate. The court felt there that a disparity of ten to one in the voting strength between electoral districts made out a *prima facie* case for invidious discrimination and called for strict justification (at 891).[16]

In *Sincock v. Duffy*, 215 F. Supp. 169, a statutory three-judge District Court (by a vote of 2 to 1) struck down a Delaware apportionment system, which, after a 1963 Constitutional amendment, still contained a disproportion of 15 to 1 in respect of the State Senate. The court concluded, *inter alia*, that insofar as the State House of Representatives, which struck a ratio of 12 to 1 was concerned, the

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[15] In *The Significance of Baker v. Carr for Indiana*, at 38 Indiana L. J. 240, comments that the court in *Sweeney*, as in *Scholle* on remand, assume that constitutionality is solely a question of percentages and ratios, rather than a broader question of rationality.

[16] In respect of *Moss*, it is not clear from whence comes the authority to strike such a positive ratio, as, e.g., 10 to 1. And *Moss* further seems to fall into the error of *Scholle* in superimposing a federally protected right upon a state requirement. (See footnotes 14 and 15.) All of this lends credence to the comment in *The Significance of Baker v. Carr for Indiana*, 38 Indiana L. J. 252, 254, that of the courts that have decided apportionment controversies since the historic *Baker v. Carr* decision, only five have determined them according to the traditional standards of the equal protection clause, namely, *Sobel v. Adams, supra; Caesar v. Williams, supra; Maryland Committee for Fair Representation v. Tawes, supra; Baker v. Carr*, on remand, *supra;* and *Lisco v. McNichols*, 206 F. Supp. 471 (striking down Colorado's apportionment system). All others ". . . have gone beyond the traditional standards of the equal protection clause suggested by the *Baker* decision, some in an apparent effort to read into that clause the court's own notion of what is and what is not a democratic system of legislative apportionment. The *Baker* decision does not require courts to choose between competing theories of representation and hold that apportionment systems *need be* based upon the population standard." (Emphasis supplied.)

apportionment basis must be one of population, citing *Gray v. Sanders, supra.* The court further concluded that none of the "area" and other considerations discussed by it should permit any wide deviation from the principle of population representation in the apportionment of the Delaware State Senate. Judge Wright, in concurring, observes that the Senate must be based *substantially* on population. Judge Layton, dissenting on the substantial question of apportionment of the Senate, stated that he could "find nothing constitutionally wrong in the makeup of a State legislature composed of a Lower House whose members are elected upon a strict population basis and an Upper House whose members are elected in equal numbers from each county . . .".

> "Since the so-called federal system has withstood 175 years of stress and strain in the national political arena. I can see no valid reason for interfering with the composition of a State Legislature modeled exactly on it." (at 196, 197)

In *Mann v. Davis*, 213 F. Supp. 577, a split three-judge District Court struck down, *inter alia*, the Virginia Senate apportionment system, which results in a disproportion in ratio of considerably less than Maryland's, the consideration being, it appears, almost solely of population. Judge Hoffman, dissenting (at 586, 591, 592), states:

> "In my judgment the decision of the majority places too much emphasis upon the weighted vote of one county, city, or district as contrasted with the weighted vote in another county, city or district. . . . When we consider other states, such as New York, Maryland and Hawaii, where the concentration of population is in one major city, it may be inappropriate to rely so heavily on population."[17]

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[17] In this connection, *Scholle v. Hare*, on remand; *Mann v. Davis*, together with *Moss v. Burkhart, supra; Sweeney v. Notte, supra;* and *Levitt v. Maynard*, 104 N.H. 243, 182 A. 2d 897, would seem

Apparently, however, Judge Edmund W. Hening, Jr. of the Richmond Circuit Court, in upholding Virginia's legislative redistricting acts by his order of September 24, 1963, differs radically in his conclusions from the majority in *Mann v. Davis, supra*. (See Washington Post and Times Herald, September 25, 1963.)

The consensus of judicial thinking, to date, as illustrated by the foregoing cases would certainly demonstrate, we think, that the rationality of any state apportionment is not determined solely by applying the "one man — one vote", purely populative theory. On the contrary, it recognizes the applicability of other substantial factors which, when applied to the Maryland Senate scheme, supports its constitutionality.

Maryland, appropriately given the cognomen of "America in Miniature", is unusually diverse, geographically and economically. Stretching from the Atlantic Ocean to its western mountains bordering West Virginia, it contains vast climatic differences. The Eastern Shore of Maryland, which is physically set apart from the rest of the State, is economically geared to agriculture, sea-food producing pursuits and to coastal recreation. Its climate is more temperate than the western regions of the State. Southern Maryland's economy is also agricultural with a strong dependence upon tobacco raising. The two principal population centers are found within the central portion of the State. One of these centers, composed of Prince George's and Montgomery Counties, partially circumscribes and is contiguous to the District of Columbia. The portions of these two counties nearest the District are suburban in

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to have departed from traditional equal protection standards by holding that reapportionment systems *must* be based upon population. See *The Significance of Baker v. Carr for Indiana*, 38 Indiana L. J. 240, 250.

nature. The southern portion of Prince George's and the western part of Montgomery are rural. The other population center includes Baltimore City and the surrounding contiguous portions of Baltimore and Anne Arundel Counties.

Whereas Baltimore City is urban in character, its two neighboring counties are not; like Prince George's and Montgomery Counties, they possess both suburban and rural attributes. The economy of mountainous western Maryland is largely devoted to agriculture, mining and timber. Numerous of its sections are sparsely populated.

While Appellants bemoan the ways in which the four most populous counties of the State and Baltimore City allegedly have languished and suffered under malapportionment, common experience points to the contrary. At the outset, even on Appellants' theory, Baltimore City insofar as the State Senate is concerned, is said to be *overrepresented.* (See Appellants' Brief, page 30.) Despite overrepresentation, still, presumably, it suffers. If Baltimore and other large cities suffer from decay, it must be laid to a great many factors other than malapportionment: migration to suburbs of both population and to an extent industry, loss of tax base and source of public finance, etc. Certainly, Baltimore and the populous counties have had no difficulty in obtaining urban renewal authority, although the latter hardly need it (with a few isolated exceptions in certain municipalities in those counties).

It must be said, despite the "cancer" of malapportionment of which the Appellants speak, that Montgomery, Baltimore, Prince George's and Anne Arundel Counties are the most wealthy, prosperous and progressive counties in the State. Partly, this may be laid to home rule, under which Baltimore and Montgomery Counties operate and

which Prince George's and Anne Arundel Counties are currently seeking to achieve. Both Baltimore and Montgomery Counties have wide taxing and other powers, within their express powers. The latter county, within very recent memory, enacted its own public accommodations ordinance and is also included under the Statewide public accommodations act.[18]

Appellants here seem to make much of the rights of *people vis-a-vis people,* but what they argue, in essence, is mathematics, formulae, proportions and figures. As Professor Bickel puts it, in *Reapportionment & Liberal Myths,* Commentary, June, 1963 (pages 490-491):

> "All we have been given are plays on words, plays on statistics, and meaningless figures arbitrarily picked out of thin air.
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> * * * * * *
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> "What does it mean to juggle ratios or to bewail the fact that 20 per cent of a state's population can elect a majority of its legislature, X percent of the population of the United States can elect the President, and X — 10 per cent can elect the Senate? These are not facts; such things never happen."

Appellants complain of gross deprivation while at the same time the counties most said to be suffering under malapportionment of the State Senate have prospered as have no others in the State. They lump together Baltimore City with the populous counties because the figures look

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[18] Indeed, it is the very existence of broad home rule powers made available to the counties under Article XI-A of the Maryland Constitution and implemented by Article 25A of the Annotated Code of Maryland which mitigate whatever disadvantage these counties may incur in the Maryland Senate. Experience has shown that it is the suburban counties that are most likely to avail themselves of the home rule option, as indicated above. Home rule counties need not return to the legislature for many of those legislative authorizations which non home rule counties can obtain only *biennally* at Annapolis.

better; actually, the city and those counties (excepting Baltimore) have little in common. The four counties involved here have both heavily populated and suburban-type areas and sparsely settled agricultural regions. The city dwellers of Baltimore, with their port authority and steel production are confronted with problems of a character completely different from those facing the four suburban counties. These urban problems, which involve large expenditures of funds, concern themselves with adequate standards of health, employment and housing for the city residents, many of whom are of the lower economic and cultural class. The suburban counties, however, are faced with problems of prosperity, which, fortunately, do not involve the same expenditure of public funds. Planning, zoning, water and sewer, subdivision control and adequate park and new school facilities command the attention of the more prosperous suburban dweller. Thus, it may fairly be said that the suburbs are peopled by the "haves" and Baltimore City by the "have nots". Yet all are combined together for purposes of Appellants' comparisons.

If population, in the apportionment of the Maryland State Senate, is to be the sole or "strongly dominant" criterion, as Appellants insist, then it becomes very probable that not only the rural counties of the State, but rural areas of the populous counties, in their turn, will become, in effect, malapportioned, with the specialized interests of those rural areas subordinated to the interests of the more densely industrialized and urbanized areas of those same counties. The State has a legitimate concern in these interests and the State through apportionment should be permitted to strike a balance, we submit, to protect them both. As Professor Bickel further states it, in *Reapportionment & Liberal Myths*, Commentary, June, 1963 (page 486):

> ". . . most, if not all, malapportionments favor rural interests over urban, allocate more strength proportionately to sparsely populated areas than to densely populated ones, and other smaller discriminations within these large ones. This may be undesirable, but who can say it is irrational? Is it more irrational than a farm policy that favors farmers or an anti-trust policy that favors small enterprise?"

And, as stated by James Kilgore Edmundson, Jr., *Legislative Reapportionment, Baker v. Carr*, 65 West Virginia L. Rev. 129, 141, 142:

> ". . . equal representation does not necessarily mean good government. . . . For 'local prejudices' are spawned not only in rural areas . . ."

Jo Desha Lucas, in his *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 Mich. L. Rev. 711, 804, states:

> "It is to be hoped that . . . the advantages of simplicity will not prompt adoption of a standard of mathematical equality based solely upon population, thus ending centuries of experimentation with the design of democratic institutions which will accommodate within the same unit of government a wide variety of interest groups without subjecting all to absolute domination by a close majority which is geographically concentrated and highly organized."

Clearly, interests other than population must be taken into account in the apportionment of the Maryland Senate, where, as in this case, the apportionment of the House of Delegates is not under attack, nor in question, and is, in fact, insofar as the record in this case is concerned, properly and constitutionally, though not perfectly, apportioned.[19]

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[19] One wonders whether population is a proper criterion in any event; should voter registration be considered?

Lisco v. McNichols, supra, recognizes as a relevant factor representation of industrial interests; *Sobel v. Adams, supra,* recognizes representation of general regional interests; *Caesar v. Williams, supra,* recognizes protection of sparsely settled areas; *Levitt v. Maynard,* 104 N.H. 243, 182 A. 2d 897, recognizes as "rational" wealth and the proportion of total taxes paid by a district; *W.M.C.A., Inc. v. Simon, supra,* recognizes a state apportionment plan "of historic origin" as "not irrational", which "clearly gives weight to population within the state's counties and which forms a basis for the ingredient of area, accessibility and character of interest", and Tyler, *Court versus Legislature,* 27 Law and Contemporary Problems, 390, 391, 393, recognizes economic interests.

The court below (R. 167, 168), in upholding the Maryland Senate apportionment plan on historical grounds, quite irrespective of population, did so on the rationale that representation on a county basis, with some modification in respect of Baltimore City, was deeply rooted in Maryland traditions and history, predating, even, the existence of the Federal Union. In fact, the court found that the United States Senate was modeled upon the Maryland plan (See R. 166). See *Journal of the Constitutional Convention,* G. P. Putnam Sons, 1903, page 202.

Starting from Appellants' beginning point, namely, that population must be the sole or dominant criterion in apportionment of the Senate, no other consideration or standard can then be accepted (see Appellants' Brief, page 72). However, Appellees submit that, on the authority cited hereinbefore, under the Maryland plan, history and tradition may be found, by this Court, to be a rational basis for the apportionment now under attack. Jerold Israel, *On Charting a Course through the Mathematical Quagmire: The Future of Baker v. Carr,* 61 Mich. L. Rev. 107, 143, comments that a court:

> "should not, as in the *Scholle* decision (on remand) reject all bases for apportionment schemes other than population as arbitrary and therefore insist upon 'practical equality' of representation. Neither should it, although most lower courts have done so, permit the use of factors other than population only insofar as population is still retained as the predominant factor. Both of these approaches can be justified only on the basis of a fundamental political value in our society which demands total equality of representation, and . . . sustaining the presence of such a fundamental concept necessarily involves the interpretation of the 'republican form of government' guaranteed to the states under Article IV, Section 4."

As the Solicitor General of the United States said, in his address before the Tennessee Bar Association on June 8, 1962 (see Current Constitutional Issues, page 3):

> ". . . History is a powerful influence in constitutional law . . . it would not surprise me greatly if the Supreme Court were ultimately to hold that if seats in one branch of the legislature are apportioned in direct ratio to population, the allocation of seats in the upper branch may recognize historical, political and geographical subdivisions provided that the departure from equal representation in proportion to the population is not too extreme."

The Appellants rely heavily upon political theories and doctrine, which in their opinion make it desirable to have certain reforms effected in the composition of the Maryland General Assembly. However, the issue presented to the court is not whether the people of the State of Maryland have prudently or imprudently adopted provisions in their Constitution, but rather whether these provisions of the Maryland Constitution transcend the limitations prescribed in the Fourteenth Amendment to the Constitution of the United States by denying to the Appellants in their

individual capacities equal protection of the laws. When a state statute or constitutional provision is attacked as being violative of the Equal Protection Clause of the Fourteenth Amendment, the test to be employed has been set down by the United States Supreme Court in *Lindsley v. National Carbonic Gas Co.*, 220 U.S. 61, 78, 55 L. Ed. 369, 377, as follows:

> "The rules . . . are these: 1. The equal protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. . . ."

See also *Metropolitan Casualty Insurance Co. v. Brownell*, 294 U.S. 580, 584, 79 L. Ed. 1070.

Stated more succinctly, the State is to be allowed every reasonable latitude, and the Maryland Constitution will not ". . . be set aside if any state of facts reasonably may be conceived to justify it. . . ." *McGowan v. State of Maryland*, 366 U.S. 420, 81 S. Ct. 1101, 6 L. Ed. 2d 393.

It is not inequality alone that calls for a holding of unconstitutionality. Only if the inequality is based on an impermissible standard should the court condemn it. In resolving the issue here presented, the personal choices of

the Appellants or Appellees are not controlling, but, rather, does the choice of the majority of the people of Maryland, as embodied in their Constitution, deny to the Appellants the equal protection of the law.

And, as has been so thoughtfully argued by Appellants in their Jurisdictional Statement filed in this Court in *Roman v. Sincock* (*Sincock v. Duffy* in the United States District Court for Delaware), pages 26, 27, 28:

> ". . . it cannot be supposed for one moment that, if the Reconstruction Congress had ever considered area representation in one house of a state legislature to constitute a denial of the equal protection of the laws, they would ever have readmitted Georgia — much less South Carolina, which had been first to secede and first to fire on the flag.
>
> ". . . So far as we are aware, no court in controversies involving apportionment of a state Senate has troubled to look to contemporaneous Congressional interpretation of the Equal Protection Clause as shown by the readmission of the former Confederate States."

To require that each house of the General Assembly be elected by a system of population proportions, as set forth in the Bill of Complaint, would substantially defeat the reasons for bicameral legislatures, particularly where the terms and qualifications of the members are the same or similar to those of the Maryland General Assembly.[20] It may be significant to note that geographical considerations have been recognized by the people of the State of Maryland in the composition of the judiciary, and that Article IV, Section 14, of the Maryland Constitution, in prescribing the composition of the Maryland Court of Appeals, states that its membership shall be composed of persons residing in certain geographical portions of the State and that the Court's composition is based solely upon these geographical

[20] See Article III, Section 9, Maryland Constitution.

considerations exclusive of the personal qualifications of the individual judges. This is further evidence of the desire of the people of the State of Maryland to have representation, whether in the legislative department or the judicial department, based upon nonpopulation considerations.

In summary, it is respectfully urged that the opinion of the trial court and of the Maryland Court of Appeals below followed the authoritative decisions of this and other courts when they ruled that the Fourteenth Amendment does not *require* that the Senate of Maryland must be elected according to population or apportioned on a basis which is grounded on considerations other than historical precedent and tradition.

II.

THE FEDERAL PLAN ANALOGY IS APPLICABLE TO THE MARYLAND SENATE.

Quite correctly, Appellants contend that the majority of the Court of Appeals below points to the so-called Federal Plan as furnishing analogy and precedent for the composition of the Maryland Senate. Quite incorrectly, we submit, Appellants advert to the evolution of the State Senate of Maryland and not finding what they consider a symmetrical, logically tidy development in that body, especially as Baltimore City is affected, they conclude that there is no valid comparison, that its apportionment scheme lacks rationality and demonstrates an absence of *any* policy of the State. Even if there were a valid comparison, they continue, the disparities present in that body violate Section 1 of the Fourteenth Amendment.

Initially, it must be conceded, we think, that the development of the Federal Union, insofar as representation in the United States Senate is concerned, was hardly on a uniform basis, nor did it represent any discernible policy.

Apart from the original thirteen states and the sovereignty relinquished by them to the Union, can it be said that their sister states (excepting perhaps Texas) thereafter gave up sovereignty to become states? Can it not be said, e.g., that the entry of Alaska and Hawaii (each with two Senators) into the union or the creation of the District of Columbia (with no representation in Congress and a vote, now, only in Presidential elections) do not constitute a distinct and substantial modification of the original so-called Federal Plan?[21] The creation of each state or group of states, as we read history, was done on an arbitrary, compromise basis. Politics, geography, economics and group pressures played their part, pressures by groups not even represented in the state-making process. The exigencies of the situation, not a cohesive, continuous, clearly charted governmental policy, controlled. However, in the American political system, can it be said that such development because it worked toward no clearly defined objective, or represented no application of stated policy, has been "irrational"? And can it be said that a periodic addition to the representation of Baltimore City in the State Senate, on the basis, undoubtedly, of compromise, because of Baltimore's unique position, geographically, as a great port city, industrially and otherwise, represents an "irrational" evolution?

By Appellants' standards, no particular form of representation in the State Senate would qualify (except purely populative) since Baltimore City is not a county. Yet, can the State be said to have acted "irrationally" in desiring, on the one hand, not to have itself dominated by Baltimore City and on the other to have, from time to

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[21] And it may be questionable whether the states forming the Union possessed anything resembling true sovereignty by virtue of their status under the Articles of Confederation. See *Amicus Brief of the Solicitor General*, pages 77, 78.

time, increased the City's representation, so as to strike a balance with the rural areas, especially where the increases were voted by a majority of the citizenry?

Is not the action of the State in regard to its Senate apportionment the "proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses", spoken of in *MacDougall v. Green, supra?*

And can it be said that a plan which allocates to each county a single Senator, on a nonpopulation basis, is an "irrational" policy, where, as has been found by the court below, the counties in Maryland "have always possessed and retained distinct individualities"? (R. 166). See the discussion in *W.M.C.A., Inc. v. Simon, supra*, at 376, where the county is shown to be a more original form of local government than any other, "traced directly to England". And see, in this respect, the opinion of the lower court (R. 165).

In respect of the argument that the states, in relation to the Federal Government, cannot be compared to the county (1) because of the attributes of sovereignty the former possess and (2) because the federal system came together on a basis of compromise among the original states whereas the county exists only at the pleasure of the State, it must again be said that the 37 states admitted to the Union after 1789 were never sovereign bodies and that none of the states now possess many, if any, true attributes of sovereignty. With each passing day, they become, more and more, mere geographical segments of the whole. And apropos of the *compromise* argument, see Professor Israel's *On Charting a Course through The Mathematical Quagmire: The Future of Baker v. Carr*, 61 Mich. L. Rev. 107, 121, 122, 124, where he says:

> ". . . it would be anomalous to hold that the Constitution condemns a state's adoption of a bicameral

legislature with one house apportioned essentially on the basis of population and the other apportioned with reference to the representation of political subdivisions when that same constitution adopted just such a legislative system, with substantial numerical inequality of representation in the Federal Senate, which has been accepted without question since its ratification.

". . . the question has been raised as to how an institutional scheme may be rational if it is the product of compromise between equal forces and arbitrary when it results from a grant made within the discretion of the granting body."

Israel concludes:

"The satisfactory operation of Congress seems to illustrate the general rationality of a system of apportionment which gives some weight (although not necessarily the same as in the federal system) to factors other than population (including, but not limited to, representation of political subdivisions)."

And see Professor Bickel's comment, in *Reapportionment & Liberal Myths*, Commentary, page 487:

"It is very well to maintain that the federal Senate and the federal Electoral College are the product of an historical compromise, which is explained by particular historical circumstances and which is not applicable to the composition of the House of Representatives or of state legislatures. But are we to believe that our federal government lacks a feature that is 'basic to the successful operation of a democracy'? — that, indeed, it contains an inconsistent feature, and is therefore not a successfully operating democracy?"

Appellees question how Appellants on the one hand can point with dismay to malapportionment and plead in this Court for justice, equality and a "one man — one vote" principle in respect of State legislative apportionment, and yet on the other hand approve, and defend, as they do, a

federal Senate system which results in a gross dilution of individual voting power up to a ratio of 75 to 1, over twice the maximum complained of here. Can the Fourteenth Amendment possibly be read in context with the Federal Constitution and Bill of Rights so as to prohibit by the state a discrimination of the type complained of here, and on the other hand permit, *even require*, a discrimination twice as great by the Federal Government in respect of individual voting power where a United States Senator is concerned? Or is the Fifth Amendment applicable to such, under the rationale of *Bolling v. Sharpe*, 347 U.S. 497, 74 S. Ct. 693, 98 L. Ed. 884.

While this Court will hardly be bound by a ruling of any lower court in these matters, the Federal analogy is not without support, in addition to the ruling of the Maryland Court of Appeals. See *Nolan v. Rhodes, supra*. And see the dissenting opinion of Judge Layton in *Sincock v. Duffy, supra*.

The argument may continue, pro and con, as to what aspects of the Maryland Senate system was admired and emulated by Madison and others of the founding fathers in their deliberations. However, it seems clear that the Maryland Senate system did serve as a model, in many respects, for the Federal Senate. *The Journal of the Constitutional Convention*, G. P. Putnam Sons, 1903, page 202; No. 63, *The Federalist Papers*.

Appellants argue that even if the Federal plan had been adopted in Maryland, it has been abandoned because of the special treatment given Baltimore City. The reason special treatment was given to Baltimore City is clear when it is considered that in 1851 Baltimore City became a separate and distinct political entity. At the time it became an independent government unit, it received the same treatment as the counties, to wit, one senator and membership

in the House of Delegates based upon population. Because of the large number of delegates to be elected from Baltimore City, it appeared that elections-at-large in Baltimore City produced an unwieldly number of candidates, and it was deemed wise and appropriate to divide Baltimore City into legislative districts so that up to the 1851 Constitution the Federal plan was substantially in effect.

The Constitution of 1864 was adopted to weaken the political strength of several Southern Maryland counties which had sympathized with the Confederacy, and had the unfortunate effect of disfranchising substantial numbers of Maryland citizens. As a result of this Constitution, representative government in Maryland came to a standstill, and it did not take long for the Constitution of 1867 to be drafted and subsequently ratified. In 1864 then, for the first time, there was a substantial deviation from the Federal plan, which recognized the domination of Baltimore City in the economic, political and social structure of the State. It is respectfully urged that this recognition of Baltimore City created an exception to the Federal plan rather than an abandonment of the same. It is further urged that there was a sound and rational State policy to support this exception.

The City of Baltimore at that time, and today, houses a vast industrial complex and is the State center of commerce. In addition, it is a major world seaport, which places Baltimore in a special trading position requiring a vast transportation and communications network. Because of these factors, unique interests have congregated in the City of Baltimore and the making of an exception recognizing these factors is a reasonable State policy.[22]

[22] See Final Report of The Commission on More Equitable Representation in The General Assembly of Maryland, Walsh, Chairman, page 9.

Territorial uniformity is not a constitutional requisite. *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281; *Ocampo v. United States*, 234 U.S. 91, 34 S. Ct. 712, 58 L. Ed. 1231.

Baltimore achieved a status of a political subdivision, independent of Baltimore County, in 1851. From that time until 1864, it had one Senator. In 1864, in recognition of its emerging status, it was, by the Constitution of that year, given three Senators. In 1867, it received broader powers of local government, retaining its three Senators. In 1900 an additional legislative district was created and again, in 1922, two more districts were created, because of an increase of territory by annexation.

Bell, *The Legislative Process in Maryland*, page 9, states that:

> "Apportionment of the Senate is based on the principle of equal representation of the counties, with some concession to Baltimore City *because of its size.*" (Emphasis supplied.)

Bell makes it clear that it was intended, e. g., under the 1837 amendment to the Maryland Constitution, to limit the representation of Baltimore City. Under the Constitution of 1851, its representation in the General Assembly was again limited. Bell does not conclude, as Appellants argue, that Baltimore City's increase in legislative districts was because of population, although it cannot be denied that its population had increased, in relation to the rest of the State.

Bell concludes (page 20):

> "The Maryland system of legislative apportionment is, as admitted by delegates to the early constitutional conventions, a compromise between the ideas of representation by counties and representation according to population. The principle of county representation is obviously given even greater weight in the Senate

than in the House of Delegates. Any discussion of revising the present distribution of seats must take into consideration several factors; the weight of tradition, the concept of county representation, legislative practices in passing local legislation, the existence in the State of one giant city, and rival theories of representation. It is no easy task to devise a system to satisfy all needs, and in practice they must be balanced by compromise."

The compromise evident in the apportionment of Baltimore City, in relation to the State Senate, is, we submit, a basis sufficient to support its rationality under the Fourteenth Amendment. The assignment of Senators to Baltimore City took place gradually, from 1776 to 1922, approved on each occasion of change by the people on constitutional referendum. To conclude, as apparently Appellants have, that because the adding of Senators and legislative districts took place in some general relation to an increase in population in Baltimore City, this population growth triggered, directly, such increase, is to ignore the other factors present in the Maryland system. In the *Report of Committee on More Equitable Representation in the General Assembly of Maryland*, February 14, 1947, the committee noted that "Maryland, while small, has a great diversity of interests scattered among the counties, such as coal, lumber, orchards, tobacco, truck farming, sea food, industry and port facilities. This fact, the committee observed, makes it essential to continue the present plan of having every county and Baltimore City represented in the legislature . . .".

It was to assure this continued diversity of interests as well as to protect the counties and Baltimore City, as it were, from each other, that the present Senate apportionment evolved to its present form. The State, in the only fashion in which such things happen under our system, haltingly, yet according to State constitutional norms and

forms of law, made its collective judgment from time to time that this evolution best served its varied interests. It cannot be said, we submit, that such an evolution *now* must be deemed not rational because it lacked the type of clearly defined goals or objectives these Appellants believe the system at every stage should have shown or because its long-range aspirations have lacked periodic restatement. Constitutional change comes slowly and is fashioned in the crucible of compromise. Even this Court, in *Baker v. Carr, supra*, has not prophesied where we go from here in reapportionment matters.

III.

THE GENERAL ASSEMBLY AS A WHOLE

As pointed out by Appellees hereinbefore (pp. 2, 3), consideration of alleged invidious discrimination or malapportionment of the General Assembly *as a whole* is not before this Court. For purposes of this case and for all other purposes, the Maryland House of Delegates is now properly apportioned by virtue of the 1962 "stopgap" legislation. Chapter 1 of the Special Session of 1962. Appellants, in pressing this point by a series of irrelevant and in fact misleading arguments, have failed to demonstrate how this Court can reach a question not only not decided below, in either the Maryland Court of Appeals or in the trial court, but a question which, in another form, was expressly conceded by them (R. 114).[23]

Appellants ingratiatingly point to a recent passage by the Senate of three proposals for amending the Constitution of the United States, all originating with the Council

[23] This legislation has been attacked as being unconstitutional and a Bill for Declaratory Decree to have the reapportionment legislation declared null and void was dismissed on September 24, 1962. (Allen, et al. v. Simpkins, et al., Circuit Court for Calvert County, Equity No. 2097.)

of State Governments, one of which would have limited the authority of this Court in respect of certain matters (Appellants' Brief, pages 63, 64). The lack of relevance to this case of the above observation by Appellants requires little answer. They then point to a failure by the Senate to approve, in 1963, certain legislation passed by the House as an indication of the general recalcitrance by the upper body of the Maryland General Assembly to participate, responsibly, in the legislative process. This is hardly the forum in which to argue the worth of particular legislation, especially the items selected by Appellants as being representative of the popular will, but suffice it to say there were substantial numbers who at the time regarded the examples cited as lacking in merit.

Appellants vow their commitment to the principle of bicameralism, insisting at the same time that it is the *existence* of the two houses, rather than the difference in the bases of those houses, that is, the essential aspect of the State two-house legislative system. Ever since the earliest times in our American Colonies local subdivisions such as towns or counties, rather than approximately equal population units, were the dominant unit of government. The Colonial Assembly and its successor, the State Legislature, were composed of representatives from these units of government.[24] In fact, the Constitution of Maryland of 1776 accepted this theory of governmental structure when it allotted to each county four members in the House of Delegates, regardless of size, population or any other factor, and also allotted two delegates to Annapolis and Baltimore Town.[25]

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[24] See discussion by Mr. Justice Frankfurter in his dissenting opinion in Baker v. Carr, 369 U.S. 186, 82 S. Ct. 691, 7 L. Ed. 2d 663, 738.

[25] Ibid. Footnote No. 5.

Representative government, whether upon the state or Federal level, has clearly recognized the lesser unit of government as a basis for political representation.

Notwithstanding the foregoing, at least since the adoption of the Constitution of the United States in 1789, the states have relinquished their "sovereignty" in the traditional sense of the word.[26] No state may enter into a treaty with a foreign nation, exchange diplomatic representatives, secede, declare war, alter its boundary or even enter into a compact with a sister state without the consent of Congress. There is no question that the states retain certain elements of sovereignty, but these elements are becoming increasingly more limited.

In reviewing the Maryland Constitution, it has been observed:[27]

> "In general, it may be observed that the discussion of the day indicates clearly that the most serious problem which confronted the framers of our Federal and State Constitutions was that of securing a practical system of checks and balances to prevent the disproportionate increase of power on the part of any one arm of the government. They sought the golden mean between the possibility of lodging oppressive power in the hands of the few or permitting the masses to run wild in excesses of sudden emotion or passion. On one hand, whilst overthrowing an established 'nobility', they feared the creation of a new autocracy of wealth and position; on the other, they dreaded an irresponsible 'mobility', as mass control was then termed. . . ."

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[26] "Sovereign", according to Webster's New International Dictionary, 2nd Edition, is defined:

> "Independent of, and unlimited by, any other; possessing, or entitled to, original and independent authority or jurisdiction; as a *sovereign* state (that is one exercising the usual powers of self-government and of declaring peace and war without outside control); *sovereign discretion*."

[27] The Federalist, edited by J. E. Cooke, Wesleyan University Press (1961), page 430

Likewise, many sister states have deemed it advisable to grant unto counties (or towns) equal representation of governmental units in at least one house of the legislature. See Book of the States, 1962-63, Council of State Governments, pages 58-62.

Appellants state that "For better or for worse, the people of the United States and, if given the chance once again, the people of Maryland, follow the principle of majority rule" (Brief, page 68). As pointed out earlier, in the Federal Congress, majority rule is not the *general* rule; rather majority rule is substantially compromised, e.g., in the United States Senate and in the District of Columbia provision. Nor can it be said that the people of Maryland have subscribed to the type of "majority rule" Appellants advance. On the contrary, under the first constitution of Maryland, in 1776 (Article XV), Appellants' principle of majority rule was not established, and in the subsequent constitutional ratifications, in 1837, 1851, 1864, 1867, 1900 and 1922, the people of Maryland voted in favor of the very thing Appellants insist the people of Maryland are not in favor of. The principle of pure "majority rule", as defined by Appellants, has never been a part of either the Federal or state systems; to hold so is to misapply experience and to misread history. In fact, the foundation stone of democratic government is the protection of the minorities from the "Tyranny of the majority." See *Nolan v. Rhodes*, 218 F. Supp. at 958. Illustrative of this is the great volume of litigation entertained by this Court in the areas of civil liberties, freedom of speech and of religion. As stated by Mr. Justice Frankfurter, in his dissenting opinion to *Baker v. Carr* (369 U.S. 301):

> "The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of

> a political equality preserved by the Fourteenth Amendment — that it is, in appellant's words 'the basic principle of representative government' — is, to put it bluntly, not true. However desirable and however desired by some among the great political thinkers and framers of our government, it has never been generally practiced, today or in the past. It was not the English system, it was not the colonial system, it was not the system chosen for the national government by the Constitution, it was not the system exclusively or even predominantly practiced by the states at the time of adoption of the Fourteenth Amendment, it is not predominantly practiced by the states today."

Appendix A to the Dissenting Opinion of Chief Judge Brune, in the Maryland Court of Appeals (R. 184, 185, 186, 187) shows that Baltimore County, with 492,428 inhabitants, and Baltimore City, with 939,024, on a 1960 basis, totaling 1,431,452, slightly under half the population of the State, if given Senators on the basis suggested by Appellants, could between them *now* virtually control the Senate. Considering their connections and community of interests, might it not be said that this combine could assert itself against all opposition, to the detriment of the rest of the State, in any given legislative situation? Obviously, carrying "one man — one vote" to its illogical, and unworkable conclusion in this case, pure equality of representation would result in a situation (based upon any reasonable projection of Baltimore County's exploding population) where Baltimore City and County combined would be able to control, and if they chose, run roughshod over the rest of the State.[28] Appellants, by manipulation

[28] Similarly, based upon any reasonable projection of population trends, the four suburban counties, if given the senatorial representation based on population which Appellants seek, could control the Senate to the detriment not only of the rural counties but of Baltimore City as well. Such a coalition could represent a real threat to Baltimore City since it is entirely possible that these four prosperous

of figures, have, in respect of the above observation, we think, become their captive. Can they argue that control by Baltimore City and County of the State Senate will assure a "proper diffusion of political initiative"? Appellees submit that the relief which Appellants demand here will result in a far worse malapportionment than is now complained of, in the words of Mr. Justice Frankfurter, 369 U.S. at 270, "disappointing to the hope".

If this Court should inquire into the question of whether the Maryland governmental structure as presently constituted actually possesses the "responsiveness" spoken of in *Baker v. Carr* and *Legislative Apportionment: A Problem of Standards*, 72 Yale L. J. 968, et seq., it should be noted that, the fact of a strong Governor, able to steer his program through the Assembly, notably where the Governor and the majority party are of the same political complexion, would tend to offset some discrepancy in Senate representation in favor of certain areas, by virtue of the Governor's ability to veto bills and by thus doing coerce legislators to support his program.

Maryland has traditionally had strong executive leadership. Maryland's Governors, now elected at large, are therefore bound to be responsive to all segments of the population of the State. The State has traditionally possessed a strong two-party system; with strong factions within each party; thus, gubernatorial candidates have been exposed to vigorous statewide primary and general elections. Both campaigns give him contact with the various diverse elements within the State. In addition, of the last six Governors (spanning the period from 1920 to the present)

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counties could combine to protect their accumulated wealth to the sacrifice of the welfare needs of the economically less fortunate people of Baltimore City.

four had previously held statewide offices.[29] Nor have Maryland's Governors been unresponsive to the urban or suburban interests of the State, four of the six having been residents of Baltimore City and one of those having served as Mayor of Baltimore City. Illustrative of the control which Maryland's Governors have exercised in the General Assembly was the success of Governor Tawes in obtaining the favorable passage of five of the six items of his 1963 legislative program.[30] One of these items, the abolition of slot machines in four southern Maryland counties, could hardly be regarded as a catering to the rural interests. See Chapter 617, Laws of Maryland, 1963.

In any event, whatever avenues of inquiry may be explored by this Court in determining whether invidious discrimination prevails in the State Senate of Maryland, the form of apportionment, here in question, we submit represents rational, though not perfect, State policy. We believe sufficient bases have been demonstrated herein on which it should be sustained.

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[29] Governors Ritchie (1920-1934), O'Conor (1939-1946) and Lane (1947-1951) served as Attorneys General prior to their governorship and Tawes (1959 to present) as Comptroller.

[30] Baltimore Morning Sun, January 3, 1963.

CONCLUSION

For the reasons herein stated, Appellees respectfully request this Court to uphold the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

THOMAS B. FINAN,
Attorney General of Maryland,

ROBERT S. BOURBON,
Assistant Attorney General
of Maryland,
Suite 1200, One Charles Center,
Baltimore 1, Md.,
For Appellees.

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IN THE

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OCTOBER TERM, 1963.

No. 29

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,
Appellants,

vs.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, *et al.*

On Appeal from the Maryland Court of Appeals

BRIEF AND APPENDIX FOR ATTORNEYS GENERAL OF THE STATES AS *AMICI CURIAE*

ARTHUR J. SILLS,
Attorney General of New Jersey,
Trenton, New Jersey.

ROBERT W. PICKRELL,
Attorney General of Arizona,
Phoenix, Arizona.

DUKE W. DUNBAR,
Attorney General of Colorado,
Denver, Colorado.

BERT T. KOBAYASHI,
Attorney General of Hawaii,
Honolulu, Hawaii.

ALLAN G. SHEPARD,
Attorney General of Idaho,
Boise, Idaho.

EDWIN K. STEERS,
Attorney General of Indiana,
Indianapolis, Indiana.

Of Counsel and on the Brief:

THEODORE I. BOTTER,
First Assistant Attorney General
of New Jersey,

HOWARD H. KESTIN,
CHARLES J. CASALE, JR.,
Law Assistants of New Jersey.

Dated: October 9, 1963.

(Additional list of Attorneys General appears on reverse side of this cover)

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-9611-12

WILLIAM M. FERGUSON,
Attorney General of Kansas,
Topeka, Kansas.

JACK P. F. GREMILLION,
Attorney General of Louisiana,
Baton Rouge, Louisiana.

T. WADE BRUTON,
Attorney General of North Carolina,
Raleigh, North Carolina.

HELGI JOHANNESON,
Attorney General of North Dakota,
Bismarck, North Dakota.

WALTER E. ALESSANDRONI,
Attorney General of Pennsylvania,
Harrisburg, Pennsylvania.

J. JOSEPH NUGENT,
Attorney General of Rhode Island,
Providence, Rhode Island.

FRANK L. FARRAR,
Attorney General of South Dakota,
Pierre, South Dakota.

CHARLES GIBSON,
Attorney General of Vermont,
Montpelier, Vermont.

Amici Curiae.

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IN THE

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OCTOBER TERM, 1963

No. 29

MARYLAND COMMITTEE FOR FAIR REPRESENTATION, *et al.*,

Appellants,

vs.

J. MILLARD TAWES, GOVERNOR OF THE STATE OF MARYLAND, *et al.*

On Appeal from the Maryland Court of Appeals

BRIEF FOR ATTORNEYS GENERAL OF THE STATES AS *AMICI CURIAE*

Opinions Below

The opinion of the Maryland Court of Appeals (R. 162) is reported in 229 Md. 406, 184 A. 2d 715 (1962). An earlier opinion of the Maryland Court of Appeals, issued on April 25, 1962, is reported in 228 Md. 412, 180 A. 2d 656. Opinions of the Ciruit Court for Anne Arundel County are not reported officially but are unofficially reported in *The Daily Record* (Baltimore), May 28, 1962, p. 1 (R. 100) and July 2, 1962, p. 3 (R. 113).

Jurisdiction

The judgment of the Court of Appeals for Maryland was entered initially on July 23, 1962, in the form of a *per curiam* order, with three of seven judges dissenting (R. 124; 229 Md. 317, 182 A. 2d 877). A timely motion for reargument was denied, without opinion, on September 11, 1962 (R. 125). The majority and dissenting opinions of the Court of Appeals for Maryland were issued on September 25, 1962 (R. 162). A notice of appeal was filed on September 28, 1962 (R. 193), and the appeal was docketed on October 24, 1962. This Court noted probable jurisdiction on June 10, 1963, 374 U. S. 804.

Appellants assert (Ab2)[1] that jurisdiction of the Court rests on 28 U. S. C. 1257(2) and 28 U. S. C. 2101(e); the Solicitor General of the United States, Archibald Cox[2] asserts (Cb1) that it rests upon 28 U. S. C. 1253.

Questions Presented

1. Whether Maryland's form of representative government, insofar as its Senate has one Senator for each county and each of six legislative districts of Baltimore City—its House of Delegates being apportioned to some extent on a population basis among the 23 counties and six legislative districts—is a rational and republican form of government guaranteed by Article IV, Section IV of the United States Constitution.

2. Whether on appeal to this Court an attack can be made on the apportionment of the Maryland House of Delegates where the appeal below did not question that apportionment.

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[1] Appellants' brief on this appeal is referred to herein as "Ab".

[2] The Solicitor General of the United States, Archibald Cox, is referred to herein as the Solicitor General or as Mr. Cox, and his brief on this appeal as "Cb".

Constitutional Provisions and Statute Involved

Sections 1, 2 and 5 of Article III of the Maryland Constitution (C App A91)[3] and Chap. 1, Acts of the 1962 Special Session of the Maryland General Assembly, Article 40, Sec. 42, Maryland Code (1962 Supp.), reproduced in A App A77[4].

Fourteenth Amendment to the Constitution of the United States (Equal Protection Clause) and Article IV, Section IV (Guaranty Clause).

Interest of the Attorneys General of the States

The attorneys general of the States appearing herein as *amici curiae* respectfully seek to aid in the Court's determination of the grave constitutional questions presented by this case. This case concerns the right of States, by and on behalf of their peoples, to select their own republican forms of State government and to seek protection from this Court, under the Guaranty Clause, for such forms of government.

This case, and other cases now before this Court, *Reynolds* v. *Sims*, Nos. 23, 27, 41; *Davis* v. *Mann*, No. 69 and *WMCA, Inc.* v. *Simon*, No. 20, will establish important segments of substantive law in a field newly opened by *Baker* v. *Carr*, 369 U. S. 186 (1962). In broad outline this case concerns the constitutionality of a State legislative system consisting of a bicameral legislature which has one house composed of one member from each of various counties and legislative districts, regardless of population, and a second house composed of members allocated to some extent on a population basis among subdivisions of the State.

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[3] Mr. Cox's Appendix is designated herein as "C App".

[4] Appellant's Appendix A is designated herein as "A App. A".

Between 1776 and 1790, eleven States had bicameral legislatures (the Pennsylvania and Georgia systems were unicameral). Of the eleven, seven based representation on political subdivisions. The county was used exclusively in New Jersey and Delaware; in Maryland, North Carolina and Virginia, counties and certain cities formed the basis for representation. Connecticut and Rhode Island used the town as the representation basis.[5] In 1961 at least 9 states provided for equal representation from a county or town as a unit, regardless of population, namely: Arizona, Idaho, Nevada, New Jersey, New Mexico, Montana, South Carolina, Vermont and Maryland (subject to the treatment of Baltimore City noted in this case).[6] In 28 State constitutions, at least one representative in one or both houses of the legislature is guaranteed to each political subdivision used as a basis for representation.[7]

This case challenges the composition of the Maryland Senate as it includes one member for each of Maryland's 23 counties and the 6 legislative districts of Baltimore City, regardless of the number of inhabitants in these political subdivisions. Md. Const., Art III, Sec. 2. The apportionment of members in the House of Delegates, based upon population, except that each county is given at least two seats, was conceded by appellants in the court below to be a proper apportionment (Cb14, nt. 6; Cb15).

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[5] Del. Const., 1776, Art. 3, 4; N. J. Const., 1776, Art. III; Md. Const., 1776; No. Car. Const., 1776, Art. II; Va. Const., 1776, Chap. II, §§V and VI; see also Connecticut's Colonial Charter of 1662 under which Connecticut was governed, Laws of Conn., 1786 and Rhode Island's Colonial Charter of 1663; *Apportionment of State Legislatures*, Report of the Advisory Commission on Intergovernmental Relations, December 1962, pp. 6-8.

[6] Cb 46; see *Apportionment of State Legislatures, supra*, Appendix A.

[7] *Ibid.*

Litigation is widespread concerning the constitutionality of various State systems of representative government. The rights of many citizens are at stake—the rights of the "minority" as well as those of the "majority". The decision in this case will be watched throughout the nation.

The objectives of our participation in this case are as follows:

1. Respectfully we seek to assist the Court in a proper interpretation of the Fourteenth Amendment and the Guaranty Clause of the Constitution as applied to the issues at hand.

2. We support the basic principle that it is not a violation of the Federal Constitution to adopt or continue a State legislature in which representation in one house is distributed among subdivisions of the State without regard to population, the other house being apportioned on a population standard.

3. We seek to give proper meaning to the "Federal analogy". We demonstrate below in detail that, in modelling the Federal Constitution, delegates to the Constitutional Convention of 1787 freely and frequently employed what may have been termed the "State analogy", comparing (a) counties or other subdivisions in relation to State governments with (b) States in relation to the proposed Federal government.

4. We seek to assist this Court in the formulation of rules or principles governing the *Maryland* case by calling the Court's attention to systems of government in other States, so that the avenue that may be opened can be held in view.

5. In general, we support the principles on which the Maryland system is based; however, we seek to have emphasized the strict limits of any rule announced by this

Court. To the extent that the *Maryland* case is distinguishable on its facts from the cases which follow we hope to preserve without prejudice the position of any other State whose legislative structure may be similar in principle but distinguishable in fact.

In this connection we note that the Solicitor General assumes "*arguendo*, without prejudice to future cases, that there may be objectives of legislative apportionment that would justify inequalities" in *per capita* voting power. But Mr. Cox asserts that this issue need not be decided in the *Maryland* case or the companion cases from Alabama, Virginia and New York (Cb17). Mr. Cox concedes: "If one house of a legislature is apportioned substantially in accordance with population, the Fourteenth Amendment may leave *wider room* for a variation in the other" (Cb21; emphasis added). Mr. Cox contends, however, that the issue is not before the Court because Maryland presents a case of unjustifiable discrimination in *both* houses of its legislature (Cb21; Cb90); therefore, he suggests that the permissible limits of departure from *per capita* equality in representation *in one house alone* need not be determined in this case. Appellants also assert in this Court that, "Unlike the (United States) House of Representatives, the Maryland House of Delegates has *never* been based on population." (Ab21). See also Ab59-60, presenting what appears to be an attack on *both* houses. But on the appeal below the apportionment of the House of Delegates was not questioned by appellants (R. 164).

Since new law is in the making it is extremely important to chart the area carefully.[8] Lower courts are rendering

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[8] See, for example Rigler, *Senate Reapportionment — The Maryland Experience*, 31 Geo. Wash. L. Rev. 812, 820 (1963) where it is said:

> "The question pending before the Supreme Court is whether a resonable relationship is required in senate apportionment."

(*Continued on following page*)

decisions in reapportionment cases based upon constitutional principles not yet announced by this Court. The consequences of those decisions are sometimes irrevocable. Therefore it is desirable to present our views to this Court even before cases in which we may be participating reach this Court.

6. We also contend that the mode of representation in State legislatures is primarily a decision for those who choose to be governed, not for the courts. Solicitor General Cox has expressed the same view in his brief,[9] but he would apply the rule differently. Mr. Cox finds that if one house is apportioned substantially in accordance with population, the Fourteenth Amendment may leave "wider room" for variation in the other house (Cb21). At Cb38 Mr. Cox finds room for State action "within limits"; at Cb46-47 he finds "considerable room"; but at Cb89 he finds only "room for argument" about this proposition.

The limits of State discretion suggested by the Solicitor General would greatly restrict choice. Mr. Cox's limits express a political philosophy to be imposed upon the States that cannot be found anywhere in the vast recordings of

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(Continued from preceding page)

The "basic issue" is described in general terms:

> "If one house is apportioned according to population, must population still be considered in apportioning the other unit of a bicameral legislature?"

[9] Mr. Cox states in his brief, at p. 45:

> "The court is not to exercise the legislative function of choosing between alternatives; still greater deference may be due the people of a State when exercising the sovereign function of shaping their own governmental institutions. The postulates of federalism also argue that in this area the national judiciary must take care to allow full scope for local self-government."

our founding fathers at the Constitutional Convention and elsewhere. We urge that in choosing a republican form of self-government, more than "a little room" was reserved or guaranteed to the States by the Federal Constitution.

Statement of the Case

This is an appeal from a judgment of the Court of Appeals of Maryland which upheld the constitutionality of the mode of representation in the Maryland State Senate.

Plaintiffs-appellants brought this action on August 12, 1960, challenging the mode of representation in the Maryland Legislature. Plaintiffs are an unincorporated association and six residents and voters of certain urban counties of Maryland and the City of Baltimore. Defendants are State officials who are required to perform various duties in connection with State elections.

Plaintiffs claimed that they were under-represented in the Legislature, in violation of their Fourteenth Amendment equal protection rights. They sought a judgment requiring that elections be held at large, or restraining elections until there is submitted for referendum vote an amendment to the Constitution which would reapportion the membership in the Legislature in conformity with the alleged requirements of the Fourteenth Amendment.

The complaint was originally dismissed by Circuit Judge Duckett, but the Maryland Court of Appeals reversed and remanded for a hearing on the merits. *Maryland Committee for Fair Representation v. Tawes*, 228 Md. 412, 180 A. 2d 656 (1962).

The Maryland Constitution of 1867, as amended, provides for a bicameral legislature called the General Assembly of Maryland, composed of a Senate and a House of Delegates. Article III, Sec. 1. The Constitution provides for the divi-

sion of the City of Baltimore into 6 legislative districts according to population. It provides for representation in the Senate by allowing one senator to each of the State's 23 counties, and one to each of the 6 legislative districts. Article III, Sections 2 and 4. There are 8 counties which have 1/20 of the number of inhabitants of Baltimore County, 1/15 of the number in Prince George's County and 1/14 of the number in Montgomery County. A majority of the Senate may be represented by one-seventh of the entire population of the State (R. 97; Cb8, 9, 20-21).

Article III, Section 5 provides for 123 members in the House of Delegates apportioned as follows: 2 each to 7 counties, 3 each to 5 counties, 4 each to 4 counties, 6 each to 7 counties and 6 each to the six legislative districts of the City of Baltimore. This section was adopted by a constitutional amendment in 1950 which fixed the representation in the House of Delegates on the basis of the federal census of 1940 (R. 32-33; Cb7, fn. 2).

After the remand, Circuit Judge DUCKETT ruled that the apportionment of the House of Delegates invidiously discriminated against Montgomery, Baltimore and Prince George's Counties, but not against the people of Baltimore City or Anne Arundel County (R. 108). He declared unconstitutional Article III, Section 5 of the Maryland Constitution. He also held that the General Assembly had power to enact a statute providing for the reapportionment of the House of Delegates.

One week later, on May 31, 1962, the Maryland Legislature enacted temporary legislation reapportioning the House of Delegates. Article 40, Maryland Code (1962 Supp.) Section 42. The new law adds 19 members to the House of Delegates, bringing the total to 142. Seven members were added to the County of Baltimore, making a total of 13, 4 to Prince George's County, for a total of 10,

4 to Montgomery County, for a total of 10, one to Anne Arundel County, for a total of 7, 2 to the third district of Baltimore City for a total of 8 and one to the fifth district of Baltimore City, for a total of 7.

On June 28, 1962, in a supplementary decision, Judge DUCKETT held that the composition of the Senate did not violate the Fourteenth Amendment, although based on political subdivisions, area and geographical location, without regard to population. Again we note that plaintiffs had conceded that the reapportionment of the House of Delegates was proper (R. 114; see Cb14, nt. 6 and Cb15).[10]

On appeal, the Court of Appeals of Maryland noted that:

> "No question is presented as to the validity of the 'stop-gap' legislation or the reapportionment of the House of Delegates." 229 Md. at 410, 184 A. 2d at 716.

The Court of Appeals affirmed, by a vote of 4 to 3 the decision of the lower court. 229 Md. 406, 184 A. 2d 715 (1962). From the determination of the highest court of the State of Maryland appellants have appealed to this Court.

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[10] The court below said that the appeal did not question the apportionment of the House of Delegates (R. 164). Rigler, *Senate Reapportionment — The Maryland Experience*, 31 Geo. Wash. L. Rev. 812, 813 (1963), states that the "stop-gap" legislation enacted by the Maryland Legislature, reapportioning the House of Delegates so as to add 19 seats to the suburban counties represented by the Maryland Committee for Fair Representation and to Baltimore City "was acceptable to the Maryland Committee with regard to the House of Delegates * * *. Accordingly, additional arguments were made in the lower court on the sole issue of senate reapportionment."

Summary of Argument

A. Introduction.

In *Baker* v. *Carr*, 369 U. S. 186 (1962) this Court held that a complaint would be entertained where it was alleged that the apportionment of the legislative houses in Tennessee, based upon a 1901 statute, "constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at p. 207. This Court there held that the Equal Protection Clause can be invoked to determine, "if on the particular facts * * * a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at p. 226. The Court suggested that exact equality was not required and that "there is room for weighting." *Id.* at 244-245.

In *Gray* v. *Sanders*, 372 U. S. 368 (1963), this Court declared unconstitutional Georgia's county unit system for counting votes in a primary for the nomination of statewide officers. The Court held that: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote * * *." The Court expressly said that the case did not present the question of whether a State may have one house in its bicameral legislature chosen without regard to population. The case at hand presents such a question.

B. The Constitutional Convention of 1787 and the "Federal Analogy".

It is said that the Federal system of legislative representation is written into the Constitution and therefore must be valid, but that it cannot be used to justify or prove the rationality of the same system when used by a State. The

principal arguments for rejecting the use of the "Federal analogy" are (a) States in the Federal system are sovereign but counties or other political subdivisions of a state are not sovereign with respect to the State government; and (b) the Federal system was a mere compromise to effectuate a union of sovereign States and is not inherently rational when employed by a State that does not have to compromise with its politically inferior subdivisions.

These distinctions apparently did not impress our founding fathers at the Constitutional Convention of 1787, for they frequently argued by analogy to State forms of government in exactly the same terms as States now refer to the Federal system for proof that it is rational to have one legislative house apportioned according to population and the other according to subdivisions of the larger government, without regard to population. See comments, *infra*, attributed to James Madison ("the counties of Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises"); Gunning Bedford, Jr. of Delaware ("An exact proportion in the representation is not preserved in any one of the States"); Elbridge Gerry of Massachusetts (in "some States there are two Branches in the Legislature, one of which is somewhat aristocratic" which assures "a better chance of refinement in the choice"); and Nathaniel Gorham of Massachusetts (the need to protect minority groups from oppression resulting from the undue influence of large states combining with others "was applicable not only to States, but to Counties or other districts of the same State"). (Citations *infra*).

Sovereignty is not a sufficient ground for rejection of the "Federal analogy". The States surrendered a large part of their sovereignty to the Federal government, but retained sufficient to afford self-government in local affairs. In the States today considerable autonomy is given to local subdivisions. A clear parallel does exist.

In dividing powers between the Federal government and State governments the delegates to the 1787 Convention desired to strike the right balance between an overpowering government on the Federal level (Alexander Hamilton would have had the President and United States Senators serve for life, during good behavior) and very independent States under the Articles of Confederation which gave the central government practically no authority at all. Here, sovereignty was an appropriate term; the concern was with the degree of authority to be retained by the States.

But in considering the mode of representation in the Federal Congress, the prime concern was how to represent fairly the different segments of society, to give effect to the principle of majority rule and yet to protect the minority against the omnipotence of the majority. The fears for the minority and the need for a check upon the major faction were recognized by delegates from the larger states as well as from the smaller. Governor Randolph of Virginia, who introduced the Virginia Plan containing the essential outlines of the new National government, nevertheless warned at the outset: "Our chief danger arises from the democratic parts of our constitution. * * * None of our constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a powerful senate, but the late distractions in that State, have discovered that it is not powerful enough." James Madison also admitted the need to temper the principle of majority rule to protect the rights of the minority. He urged the election "of one branch at least" by the people directly, but considered it necessary to provide a remedy against majority interests combining against a minority. He felt that the community should be divided into "so great a number of interests and parties" that common interests would not likely be formed or effectively expressed. (Citations *infra*).

The smaller States feared being "swallowed up" by the larger (William Paterson of New Jersey). They feared that ten states would be "at the mercy of Virginia, Massachusetts and Pennsylvania" (Alexander Martin of North Carolina), and that the delegates of Pennsylvania and Virginia were seeking a system in which they would have "an enormous and monstrous influence." (Gunning Bedford, Jr. of Delaware). They insisted upon representation of "the people" in one house and representation "by States" in the other. (Citations *infra*). But this assures ample representation for the majority. The majority elects representatives to one house, elects the president, and the majority in each State elects representatives to the United States Senate.

The analogy between States and the Federal government in the organization of representative government is intellectually inescapable. For example, except that in the Federal Senate there are two Senators for each of 50 States and in the New Jersey Senate there is one Senator for each of 21 counties, New Jersey presents a classic example of the same system. The New Jersey system was adopted in its 1776 Constitution; the Federal plan came later, in 1787. Both have continued to this day, with refinements in the apportionment of representatives in the larger house. The apportionment in the larger house among New Jersey's 21 counties, as in the House of Representatives, is on a population basis, using the identical formula, the Method of Equal Proportions.

C. Representation According to Population combined with Representation of Subdivisions of the Larger Government is a Rational, Republican Form of Government for States as well as the Federal Government.

The genius of this system of representative government has been acclaimed over the ages. Those who have shared these views were John Stuart Mill, John Adams, Alexis

DeTocqueville and Woodrow Wilson. Benjamin Franklin rejected the suggestion at the 1787 Constitutional Convention that the United States be divided into 13 equal parts, with state boundaries erased, pointing out that continuous changes and divisions would be required to maintain equal proportions of inhabitants. The need to continue recognition of pre-existing political subdivisions or systems of territorial or geographic representation has been affirmed in recent times. Durfee, *Apportionment of Representation*, 45 Mich. L. Rev. 1091 (1945) and DeGrazia, *Public and Republic*, p. 84 (1951).

Choosing or designing a system of representative government is a function of political judgment. We respectfully submit that the people of the States should have the right to exercise their own judgment in these matters.

In the case at hand appellants did not question in the Court below the apportionment of the Maryland House of Delegates. That being so it is for the people of Maryland to determine how the subdivisions of the state should be represented in the Senate, without regard to population. As stated in *The Federalist*, No. 43 (Madison, Jan. 23, 1788): "As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to so do, and to claim the federal guaranty for the latter." Article IV, Section IV, United States Constitution, the Guaranty Clause.

According it is respectfully submitted that representation in a State bicameral legislature according to population in one house and according to subdivisions of the State in the other house is a rational, republican form guaranteed by the Federal Constitution and not offensive to the Fourteenth Amendment.

ARGUMENT

POINT I

A State bicameral legislature consisting of one House in which representation is according to population and a second House in which political subdivisions are represented regardless of population, is a rational, republican form of government guaranteed by the United States Constitution.

A. Introduction.

In *Baker* v. *Carr, supra*, this Court held that a justiciable controversy within the jurisdiction of a Federal court is presented by a complaint alleging that the Fourteenth Amendment equal protection rights of plaintiffs were violated by the composition of Tennessee's bicameral General Assembly. The complaint there alleged that the apportionment of Representatives and Senators under a 1901 Tennessee statute was arbitrarily made "without reference * * * to any logical or reasonable formula whatever". *Id.* at p. 192. That such apportionment also violated Tennessee's State Constitution was not deemed legally significant to this Court's exercise of jurisdiction[11].

The General Assembly of Tennessee consisted of a Senate with 33 members and a House of Representatives with 99

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[11] In 369 U. S. at 195, nt. 15, the Court said:

"Since we hold that appellants have—if it develops at trial that the facts support the allegations—a cognizable federal constitutional cause of action resting in no degree on rights guaranteed or putatively guaranteed by the Tennessee Constitution, we do not consider, let alone enforce, rights under a State Constitution which go further than the protections of the Fourteenth Amendment."

members. The Tennessee Constitution required apportionment of members of both houses in accordance with population. The Constitution required a new apportionment in the year 1871 and "within every subsequent term of ten years" thereafter. *Tenn Const.*, Art. II, Sections III, IV, V and VI. However, no apportionment had been made in Tennessee since 1901. The Court held that a justiciable cause of action upon which appellants would be entitled to appropriate relief was stated by appellants' claim, "that the 1901 statute constitutes arbitrary and capricious state action, offensive to the Fourteenth Amendment in its irrational disregard of the standard of apportionment prescribed by the State's Constitution or of any standard, effecting a gross disproportion of representation to voting population." *Id.* at p. 207. The Court held that the Equal Protection Clause can be invoked to determine, "if on the particular facts * * * a discrimination reflects *no* policy, but simply arbitrary and capricious action." *Id.* at p. 226.

Mr. Justice DOUGLAS, concurring, said the question is: "may a State weight the vote of one county or one district more heavily than it weights the vote in another?" He answered this question by pointing out that the Equal Protection Clause prohibits only "invidious discrimination" and said:

> "Universal equality is not the test; there is room for weighting." *Id.* at pp. 244-245.

The complaint alleged "invidious discrimination", and Mr. Justice DOUGLAS held that plaintiffs should be given the opportunity to prove it. *Id.* at p. 245.

Mr. Justice CLARK, concurring, repeated the rule of *MacDougall v. Green*, 335 U. S. 281, 284 (1948), in testing whether state policy is rational:

"It would be strange indeed, and doctrinaire, for this Court, applying such broad constitutional concepts as due process and equal protection of the laws, to deny a State the power to assure a proper diffusion of political initiative as between its thinly populated counties and those having concentrated masses, *in view of the fact that the latter have practical opportunities for exerting their political weight at the polls not available* to the former." (Emphasis added.)

In the views of Mr. Justice CLARK, the Court should refrain from intervening "where there is some rational policy behind the State's system". He held that "numerical equality of representation throughout a State" is not constitutionally required. *Id.* at 253, 260. Mr. Justice STEWART, who also concurred, cited the rule of *Mac Dougall* v. *Green*, *supra*, that of *McGowan* v. *Maryland*, 366 U. S. 420, 425 (1961), holding "the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others", and that of *Metropolitan Casualty Ins. Co.* v. *Brownell*, 294 U. S. 580, 584, (1935), holding "the burden of establishing the unconstitutionality of a statute rests on him who assails it." *Id.* at pp. 265-266. Mr. Justice STEWART then said:

"Today's decision does not turn its back on these settled precedents." *Id.* at p. 266.

Mr. Justice FRANKFURTER and Mr. Justice HARLAN dissented.

In *Gray* v. *Sanders*, *supra*, the Court held unconstitutional Georgia's county unit system for counting votes in the Democratic primary for the nomination of a United States Senator and other statewide officers. Mr. Justice DOUGLAS delivered the opinion of the Court, Mr. Justice HARLAN dissenting.

Mr. Justice DOUGLAS carefully pointed out that *Gray* v. *Sanders* did not decide the issues which are now before this Court. He said that the case does not present the question, "inherent in the bicameral form of our Federal Government whether a State may have one house chosen without regard to population." *Id.* at p. 376. He said that *Gray* v. *Sanders* was "only a voting case" (*Id.* at p. 378) and held for the Court that:

> "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit." (*Id.* at p. 379)..

The foregoing briefly demonstrates how far this Court has gone and how far it has not yet gone into the thicket of representative government issues.

B. The Constitutional Convention of 1787 and the "Federal Analogy".

In our view the political concept on which the system of representation in the United States Legislature is based may be applied with equal validity to state legislative houses similarly organized.

It has been argued that the "Federal analogy" does not justify legislative systems of the States. By this is meant that the political philosophy or concept on which our Federal Legislature is based may not be invoked by states to justify a diffusion of legislative representation on the basis of population in one house and political or geographical units in the second house. Whether or not rational, the Federal legislative scheme is written right into the Federal Constitution, so it must be accepted. But it has been said that the Federal scheme does not prove that a similar system is rational for States.

The most common arguments against the application of the "Federal analogy" are: (a) that individual States are sovereign with respect to the National Government, but counties or other political units within a state are not sovereign with respect to the State government (Cb80), and (b) that the plan for the National Government was adopted merely as an expedient, a compromse (Cb73), but that States can maintain a system against the Fourteenth Amendment only if it is rational. It must be implicit in this latter argument that the plan, adopted simply as a compromise, is not a rational mode of affording representation to members or units of a society and therefore cannot pass the test of the Fourteenth Amendment when employed by States.

Opponents of the "Federal analogy" are mistaken on a number of grounds. In the first place, analogy does not mean identity, it means similarity.[12] In developing the Federal plan, the delegates to the Constitutional Convention of 1787 often argued on the basis of what might have been termed the "State analogy". They compared counties or towns in relation to state governments with states in relation to the proposed Federal government. In fact, as rational beings, they also made comparisons with foreign governments, both ancient and contemporary, as was appropriate or useful to their purposes.

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[12] "Analogy" is defined as "A relation of likeness, *between* two things or *of* one thing *to* or *with* another, consisting in the resemblance not of the things themselves but of two or more attributes, circumstances, or effects; * * * *Analogy* is very commonly used to denote similarity or essential resemblance; but its specific meaning is a similarity of *relations*, and in this consists the difference between the argument from *example* and that from *analogy*. In the former we argue from the mere similarity of two things in the latter, from the similarity of their *relations*." Webster's New International Dictionary (2nd Ed. 1943).

We have shown above that between 1776 and 1790 eleven states had bicameral legislatures, and of the eleven, seven based representation on political subdivisions. In *Baker* v. *Carr, supra,* Mr. Justice FRANKFURTER accurately traced the condition of representative government in the Colonies. He said, 369 U. S. at 307-308:

> "Nevertheless, the basic English principle of apportioning representatives among the local governmental entities, towns or counties, rather than among units of approximately equal population, had early taken root in the colonies. * * * [I]n most of the colonies delegates were allowed to the local units without respect to numbers. This resulted in grossly unequal electoral units. * * * Madison in the Philadelphia Convention adverted to the 'inequality of the Representation in the Legislatures of particular States, * * *' arguing that it was necessary to confer on Congress the power ultimately to regulate the times, places and manner of selecting Representatives, in order to forestall the over-represented counties' securing themselves a similar over-representation in the national councils. * * * King also spoke of the extreme numerical inequality arising from Connecticut's town-representation system.
>
> "Such inequalities survived the constitutional period."

The historical analysis made by Mr. Justice FRANKFURTER is reflected in the debates at the Constitutional Convention of 1787. S1a *et seq.*[13]

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[13] References to pages of our Appendix A, which contains abstracts of views expressed in the Constitutional Convention of 1787, are referred to herein as S1a *etc.* As stated in the Appendix, the source of this material is *The Records of the Federal Convention* (Farrand, ed. 1911).

Early in the Convention, on May 30, 1787, Madison drew an analogy between states participating in a National government and counties in a State government, saying:

> "* * * [T]here was the same reason for (different numbers) of representatives from different States, as from Counties of different extents within particular States." S4a-5a.

See also; S6a. However, with some inconsistency, James Madison is reported by Robert Yates of New York to have said:

> "In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate, and yet the smaller has an equal vote with the greater, and no inconvenience arises." S21a. (Mr. Cox questions the accuracy of this quotation. See C App. B24).

Gunning Bedford, Jr., of Delaware, speaking for the smaller states who sought an equal voice in the Senate, spoke of the "inequality of representation" in the government of Britain and in the representation of boroughs. He said further, "An exact proportion in the Representation is not preserved in any one of the States." S26a.

Elbridge Gerry of Massachusetts, a large state whose delegates generally espoused the principle of proportional representation, nevertheless drew an analogy to "some States (where) there are two Branches in the Legislature, one of which is somewhat aristocratic", which he considered would assure "a better chance of refinement in the choice" of representatives. S10a. Other delegates argued by analogy to the States, for example, Williamson (S13a), Gorham (S19a-20a), and Randolph (S3a).

Logically, using analogies or comparisons with pre-existing forms of government was a natural step in the reasoning toward the form of government to be adopted at the

Convention. In fact, were a State or Federal government to be formed today, it would defy rationality to suggest that the framers should not consider forms of government that are in vogue.

We refer to New Jersey for an example of the classic case. New Jersey's form of representative government in 1776 was similar to the form adopted by the Constitutional Convention. Today it is almost identical to that of the Federal government. New Jersey has a Legislature composed of a Senate, with one Senator from each of 21 counties, and a General Assembly, with Assemblymen apportioned to each of the 21 counties according to the formula known as the Method of Equal Proportions, with each county guaranteed at least one member. N. J. Const. Art. IV, Section I, par. 1, Section II, par. 1 and Section III, par. 1; also, Laws of N. J. 1961, c. 1, providing for apportionment in one chamber by the Method of Equal Proportions, the same as is used for the United States House of Representatives. The only difference between the New Jersey system and the Federal is that in the United States Senate there are two Senators for each of the member states; in New Jersey each county has one State Senator. Both systems have a Chief Executive with similar powers vis-a-vis their units of government. Is it intellectually possible not to draw an analogy between the two governments?

Reverting to earlier times, we note that the 1776 Constitution of New Jersey provided a similar form of government, consisting of a Governor, a Legislative Council (now the Senate) composed of one member from each of the counties and a General Assembly, whose members were apportioned on the basis of three to each county, subject to reapportionment among the counties "on the principles of more equal representation", providing the total did not exceed 39 members. Constitution of N. J. 1776, Articles

I, II and III. The provisions of the 1776 Constitution were modified in the 1844 Constitution of New Jersey, and the provisions of the 1844 Constitution are the same as in the current Constitution of 1947. Thus, since 1776, New Jersey's Constitutions provided substantially. the identical form of representative government as was adopted for the Federal system in 1787.[14] In other words, New Jersey had this system before the Federal government did, and New Jersey has continued the system with some minor refinement to assure representation in one chamber proportioned every 10 years according to population "as nearly as may be."

Now we turn to the "sovereignty argument" used by those who reject the "Federal analogy." We contend that differences in the scope of sovereignty do not destroy the analogy. Sovereign powers not granted to the Federal government were reserved to the lower governments, the States. Tenth Amendment, United States Constitution. On the state level, powers not granted to local subdivisions were reserved to the higher government, the State governmnt. But States within the Federal system are not entirely sovereign and did, in fact, surrender a large part of their

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[14] We note that in 1784 the population of the various counties in New Jersey ranged from 2,231 in the minimum (Cape May County) to 18,363 in the maximum (Hunterdon County). Votes of Assembly, 1780-1786, p. 33, *All Votes and Proceedings of the Ninth General Assembly*. The last of New Jersey's 21 counties was formed before 1860; there have been no additions or deletions of counties since that time. In 1960, the widest disparity in representation in the New Jersey Senate was between Cape May County, with 48,555 inhabitants and Essex County, with 923,545 inhabitants. *New Jersey Legislative Manual*, 1962, p. 265. An attack upon New Jersey's form of government was rejected in *Jackman* v. *Bodine*, 78 N. J. Super. 414 (Ch. Div. 1963), appeal pending before the Supreme Court of New Jersey on its own certification, —— N. J. —— (1963).

sovereignty to the Federal government.[15] Similarly, although local subdivisions of a State are not entirely sovereign units, they have been granted considerable autonomy by the higher government.[16] Thus, in both relationships,

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[15] Supremacy Clause, Art. VI, Clause 2, U. S. Const.; see powers of Congress, Art. I, Section 8, U. S. Const. Activities of the Federal government "are free from regulation by any state." *Mayo* v. *United States*, 319 U. S. 441, 445, rehearing denied, 320 U. S. 810 (1943). Activities of the State governments are free from regulation by their political subdivisions.

[16] The New Jersey Constitution of 1947, Art. IV, Sec. VII, par. 11, provides:

> "The provisions of this Constitution and of any law concerning municipal corporations formed for local government, or concerning counties, shall be liberally construed in their favor. *The powers of counties* and such municipal corporations *shall include not only those granted in express terms but also those of necessary or fair implication, or incident to the powers expressly conferred,* or essential thereto, and not inconsistent with or prohibited by this Constitution or by law." (Emphasis added.)

New Jersey statutes grant broad powers to county governments. See R.S. 40:20-1 and R.S. 40:18-3. The County Board of Chosen Freeholders is the "legislature of the County," controlling its property and financial interests.

Since New Jersey has no income or sales tax, the substantial tax burden is levied against real and personal property. All of these taxes are raised by municipal and county governments entirely for local use; no county shares these taxes with any other county, nor with the State government. N.J.S.A. 54:4-1 *et seq.*, and see *Ridgefield Park* v. *Bergen County Board of Taxation*, 31 N. J. 420 (1960). The New Jersey State government has been given less taxing power by statute than local subdivisions have. The State government depends on various excise and other taxes, such as corporate franchise taxes, motor vehicle licensing fees and other taxes which are often referred to as "vice taxes"—taxes on alcoholic beverages, cigarettes and racing receipts.

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neither unit in government has the exclusive sovereign power. Laws of the Federal government are supreme over State governments and laws of State governments are supreme over their political subdivisions. Thus, in determining a theory of government which will permit local movement with some autonomy within the orbit of a higher government, similarities and analogies rationally can be considered between separate governmental societies. As Roger Sherman of Connecticut said: "The question is not what rights naturally belong to men; but how they may be most equally and effectively guarded in Society." (S21a). And Alexander Hamilton observed: "* * * individuals forming political societies modify their rights differently, with regard to suffrage. Examples of it are found in all the States." (S23a). The extent to which sovereignty of the States was a factor will be considered further below.

Considering the experience under the Articles of Confederation, the delegates quickly rejected the concept of a unicameral National legislature. Governor Randalph's plan, commonly called the Virginia Plan, was introduced at the opening session of the Convention on May 29 (S2a). On

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The Advisory Commission on Intergovernmental Relations in its December, 1962 report, *Apportionment of State Legislatures*, considered the nature of the "Federal analogy" at pages 42 to 44. The usual arguments for and against the analogy are contained therein. The comments conclude with the following statement:

> "It can be argued with some force on the other hand that with the spread of municipal and county home rule, local units of government are becoming residuaries of 'sovereignty' in a fashion somewhat comparable to the Federal-State relationship. For example, there is considerable sentiment in New York and other States for constitutional provisions reserving to local government all powers not delegated to, or assumed by, the State government."

May 31, the Committee of the Whole, to whom the Randolph plan was referred for consideration, accepted by unanimous vote the resolution for a National legislature consisting of two branches (S5a). Although the delegates also showed an early disposition for electing the members of the first branch by the people of the several States (S5a), the delegates strongly disagreed at the outset on proposals for determining the measure of representation in the two branches.

Notwithstanding his introduction of the Virginia Plan, which called for proportional representation in both houses, Governor Randolph at the first business session warned against excesses of democracy. He said (S3a):

> "Our chief danger arises from the democratic parts of our constitution. * * * None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom. Maryland has a more powerful senate, but the late distractions in that State, have discovered that is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient."

See also Governor Randolph's similar remarks the following day, May 31, where he spoke of the "follies of democracy" and asked for "some check" against this tendency, suggesting, "that *a good Senate* seemed the most likely answer to the purpose." (S6a; emphasis added).

The fears for minority groups were expressed primarily by delegates from the smaller states, such as Connecticut, Delaware and New Jersey, but were acknowledged from time to time by delegates from the larger states. Two days after Governor Randolph's opening remarks, Elbridge Gerry, of Massachusetts, one of the three larger states,

said: "The evils we experience fall from the excesses of democracy." He added that he was still "republican", but "had been taught by experience the danger of the levilling (sic.) spirit" (S5a). It was at this point that James Madison urged, "the popular election of *one* branch of the national Legislature as essential to every plan of free Government." (S5a; emphasis added).

Later, on June 6, 1787, James Madison admitted the need to temper in some fashion the principle of majority rule so as to protect the rights of the minority. He again repeated the need to elect "one branch at least" by the people directly (S7a). But he conceded that the source of unjust laws has been the common interest of the "major number". He said: "In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. * * *" (S7a-8a). Madison offered a remedy for a "Republican Government" where the "Majority if united have always an opportunity." (S8a). He said:

> "The only remedy is to enlarge the sphere, and thereby divide the community into so great a number of interests and parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale and in such a form as will controul all the evils which have been experienced." (S8a).

On the fears for the minority and the need for a check on the majority, see also comments of Gunning Bedford, Jr., of Delaware, who accused the delegates of Pennsyl-

vania and Virginia of seeking a system "in which they would have an enormous and monstrous influence" (S11a); David Brearley, of New Jersey, who urged an equal vote for each State to prevent the smaller States from being "destroyed instead of being saved" (S12a); William Patterson, of New Jersey, who feared that his State "would be swallowed up" (S13a); Roger Sherman, of Connecticut, who feared that a few large States would rule the rest (S15a); Alexander Martin, of North Carolina, who opposed placing "10 States at the mercy of Virginia, Massachusetts and Pennsylvania" (S19a); Nathaniel Gorham, of Massachusetts, who agreed that "there was some weight in the objections of the small states" (S19a); and, Oliver Ellsworth of Connecticut who urged that the minority did not wish to rule the majority but that "the power is given to the few to save them from being destroyed by the many;" and who also said that it was not "novel" that "the few should have a check on the many," referring, by analogy, to the House of Lords and the Commons in England (S24a).

The remarks of Nathaniel Gorham of Massachusetts (a large state) are particularly appropriate in demonstrating the need to protect minority groups from oppression by the majority, whether the relationship is in the Federal or a State system. He recognized that large states could combine with others and have "an undue influence". He then said:

> "This remark was applicable not only to States, but to Counties or other districts of the same State" (S19a).

Mr. Gorham suggested a remedy, namely, that representatives of the larger districts "should not be in an exact ratio to their numbers". He said that experience in Massachusetts had shown the wisdom of this provision (S-19a-20a).

A fair reading of all the debates shows that the claims for sovereignty were primarily justification for a defense against majority faction. The smaller States were willing to yield their sovereignty to the larger union and did so by the grant of important powers to the Federal government. These powers included the power of taxation, which James Madison termed "the highest prerogative of supremacy." (S21a). Rufus King of Massachusetts pointed out that the States were not "sovereigns" in the sense contended by some, and that if they had retained "some portion of their sovereignty, they had certainly divested themselves of essential portions of it." (S18a-19a).

In the debates, claims for sovereignty, justice, liberty and other high values did not entirely conceal what was at stake. Mr. Alexander Hamilton observed: "The truth is it is a contest for power, not for liberty." (S23a). When the so-called New Jersey Plan (strengthening the central government under the Articles of Confederation but keeping its form) was proposed, apparently as a counter-measure to the insistence by the larger States on proportional representation in both houses of the Legislature, John Dickinson, of Delaware, said to James Madison: "You see the consequences of pushing things too far." (S17a). See also: *The Federal Convention and the Formation of the Union of the American States.* (Solberg ed. 1958), at xci-xcii, where Professor W. Solberg of Yale University, in his introduction, stated:

> "If the words are those of 'sovereignty' and 'liberty,' the intent may be that of state rights or slave breeding. Yet lofty expressions did not always mask baser motives."[17]

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[17] With some prescience James Madison later argued that the real line of division between the States was not between the small and large States, as such, but between the northern and southern States.

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It is fair to conclude that the form of representative government which was ultimately reached, frequently described as representation "of the people" according to numbers in one house, and representation "of the states" in the other house,[18] was a rational plan designed to meet the acute fears of the minority, to serve as some check upon the majority, and to assure that the voice of the few would be heard in the councils of government. Majority rule was not rejected. The majority would elect not only representatives to the larger house but, also, the majority in each State would elect representatives to the smaller house. The majority would also elect the Chief Executive whose influence, combined with that of one house in the legislature, accords ample representation to majority interests.[19]

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"principally from (the effects of) their having or not having slaves * * * *." (S23a to S24a). These views did not convince the smaller States that they were secure against the possibility that larger States would combine along other lines of interests and overwhelm the smaller States with their voting power.

[18] William Johnson of Connecticut expressed the not uncommon view that the States be considered in two capacities, one in their political capacity and the other as districts of individual citizens, with the two ideas combined so that in one branch of the legislature the *people* would be represented, in the other, the States (S22a). See also comments of Ellsworth of Connecticut (S22a) and William Davie of North Carolina, "We were partly federal, partly national in our Union." (S25a).

[19] To continue the comparison with a State such as New Jersey, we note that the 1947 Constitution of New Jersey greatly strengthened the powers of the Governor, with "a centralization of authority and power in the office of the Governor under reasonable checks and balances, so that the chief executive may be truly responsible to the people for the conduct of the executive branch of the government." Milmed, *Introduction to the New Jersey Constitution of 1947*, N.J.S.A. Const., XIII, XXI. The result is a strong Chief Executive, elected

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C. Representation According to Population combined with Representation of Subdivisions of the Larger Government is a Rational, Republican Form of Government for States as well as the Federal Government.

The delegates agreed to support the plan which came out of the 1787 Convention and did so. Madison vigorously urged adoption of the system of representative government that was designed at the Convention and praised its virtues in protecting minority interests against the uncontrolled passion of the majority. *The Federalist* No. 10 (Madison, Nov. 22, 1787); *The Federalist* No. 62 (Hamilton or Madison, Feb. 7, 1788).

Eminent political thinkers have applauded the concept of a bicameral legislature with one branch serving as a check upon the other. John Adams expressed the same view, that "a people cannot be long free nor even happy whose government is in one assmbly." A single assembly, he argued, would be subject to fits of passion, prejudice and emotion which would result in hasty and unjust legislation. *John Adams Works*, Vol IV, p. 195 (1851).

John Stuart Mill feared that when a majority in a single assembly assumed a permanent character composed of the same persons acting together and always assured of victory, it easily became despotic, "if released from the necessity of considering whether its acts will be concurred in by another constituted authority." John Stuart Mill, *Considerations on Representative Government*, Chap. XIII, p. 98 (1926).

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by the majority of the people, one House apportioned "as nearly as may be according to the number of" inhabitants of the 21 counties, and the Senate composed of one member from each county, elected by the majority within each county. (Const. of N. J., 1947 Art. IV, Sec. III, par. 1).

Another student of the subject admonished:

> "Of all the forms of government that are possible among mankind, I do not know any which is likely to be worse than the government of a single, omnipotent, democratic Chamber. It is at least as susceptible as an individual despot to the temptations that grow out of the possession of an uncontrolled power, and it is likely to act with much less sense of responsibility and much less real deliberation." Lecky, *Democracy and Liberty*, Vol. I, Ch. IV, p. 361 (1896).

In more recent times, Woodrow Wilson expressed the same thoughts. Luce, *Legislative Assemblies*, p. 75 (1924) says the following:

> "A foremost authority of our own time, Woodrow Wilson, thought along the same lines. The Senate, he observed, is valuable in our democracy in proportion as it is undemocratic. 'I think that a philosophical analysis of any successful and beneficent system of self-government will disclose the fact that its only effectual checks consist in a mixture of elements, in a combination of seemingly contradictory political principles; that the British Government is perfect in proportion as it is unmonarchical, and ours safe in proportion as it is undemocratic; that the Senate saves us often from headlong popular tyranny.'" (Citing, Wilson *Congressional Government*, Ch. IV, pp. 226, 227 (1925)).

Many other political theorists have expressed the same view, that the main function of two dissimilarly apportioned houses is to protect the rights of the minority against an oppressive majority. Alexis DeTocqueville asserted that the "greatest dangers of the American Republic proceed from the omnipotence of the majority." DeTocqueville, *Democracy in America*, Vol. I, pp. 268-270. DeTocque-

ville feared that in a pure democracy the tyranny of the majority, if omnipotent, might undermine the rights of minorities.

The same opinion was expressed earlier in *The Federalist*, No. 51 (Madison or Hamilton, Feb. 6, 1788):

> "It is of great importance in a republic not only to guard society against oppression of its rulers, but to guard one part of society against the injustice of the other part."

Lastly, many writers predict practical difficulties in having both houses apportioned according to population. "It is impossible to disregard entirely the pre-existing political subdivisions of the state and to set up the desired number of legislative districts purely on the basis of population." Durfee, *Apportionment of Representation*, 45 Mich. L. Rev. 1091, 1092 (1945). See also remarks of Benjamin Franklin, at the Constitutional Convention of 1787 in response to an early suggestion by representatives of New Jersey, "that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts" (S12a). Benjamin Franklin found it impracticable to disregard borders and begin anew. At the outset it would mean that part of Pennsylvania would be given to New Jersey and part to Delaware and over the years continuous changes and divisions would be required to maintain equal proportions of inhabitants (S15a).

Another authority concludes as follows:

> "However, democratic governments have rested so long on systems of territorial or geographic representation that they perhaps would not long survive a complete change in their anatomy. The territorial system, furthermore, fosters the spirit of the whole as against

its parts, and at the same time it provides a measure of interest (including economic) representation. '*The democratic way is the path of compromise achieved through intelligence,*' and territorial representation best promotes such compromise." DeGrazia, *Public and Republic*, p. 171 (1951). (Emphasis added).

Choosing or designing a system of representative government is, obviously, a function of political judgment. Because the arguments were made by Mr. Justice FRANKFURTER, with whom Mr. Justice HARLAN joined, in *Baker* v. *Carr*, *supra*, and because of the recency of that decision the purpose here is not to contend that the political nature of the issue precludes its consideration by this Court. The purpose is to ask deference for the views of the States in organizing their own governments. The Solicitor General contends (Cb65) that "practice and democratic theory were not nearly so far apart in 1789 as today. But even if they were, what are most relevant are our aspirations, not our failures." We respectfully submit, however, that here the Solicitor General is simply engaging in political-philosophical debate, not a discussion of law. We do not admit failure on the national level, due to the form of representative government in Congress. Nor do we admit failure in State governments, although states have chosen varying modes for their representative organization. We respectfully submit that the people of the States should have the right to exercise their own judgment in these matters.

In the case at hand, appellants had conceded in the court below that the apportionment in the house of Delegates is valid. On that assumption we have no hesitancy in asserting that the representation in Maryland's State Senate is valid also. There, each county has one representative and the City of Baltimore is divided into six districts to permit representation by one Senator per district, thus,

in effect, giving the City of Baltimore six Senators. We would support the system if no special treatment were given to the City of Baltimore, and we support that system as it is. It is for the people of Maryland to determine to what extent, not exactly in proportion to population, representation in the State Senate should be apportioned among the political subdivisions of the State. But Mr. Cox condemns the system because it is not consistent. It allows representation not only on the basis of counties, but also on the basis of another political subdivision; the City of Baltimore, because of that city's large population. (In 1960 the City of Baltimore had approximately 30 per cent of the population of the entire State, 939,024 out of 3,100,689 (R. 97). It was given 6 Senators out of the total of 29. In the House of Delegates it now has 39 out of a total of 142 seats). Mr. Cox contends that, having chosen to equalize the representation of political subdivisions in the Senate to some extent on the basis of population, the Fourteenth Amendment has been violated because the population standard has not been followed faithfully and consistently (Cb54). But we think that the City of Baltimore must mean more than an aggregate of population, and Maryland can give it such weight as a separate political subdivision as that State deems appropriate. It cannot be said that the Constitutional apportionment of the Maryland Senate "reflects *no* policy." *Baker v. Carr, supra.*

The Solicitor General says: "Our entire history teaches the ideals of voter equality and majority rule" (Cb60). If by "majority rule" Mr. Cox means the unfettered dominance of a major fraction, the answer has already been given by our founding fathers and scholars who followed. Nor do we find authority for the Solicitor General's assertion that: "The framers were in agreement that, as to a State government, with full powers directly over the people, both houses must be apportioned on the basis of popu-

lation." (Cb80). The framers were certainly not "in agreement" on this proposition. As we have shown above, even those delegates who championed popular representation in the National Government recognized the desirability of having diverse houses with a strong smaller house serving as a check upon the popularly elected house. See remarks of Randolph and Madison, S3a, 7a-8a.

Discussing the constitutional provisions which guarantees to each State a republican form of government, James Madison said in *The Federalist*, No. 43. (Madison, Jan. 23, 1788):

> "But the authority extends no further than to a *guaranty* of a republican form of government, which supposes a pre-existing government of the form which is to be guaranteed. *As long therefore as the existing republican forms are continued by the States, they are guaranteed by the Federal Constitution. Whenever the States may choose to substitute other republican forms, they have a right to so do, and to claim the federal guaranty for the latter.* The only restriction imposed on them is, that they shall not exchange republican for anti-republican Constitutions; a restriction which it is presumed, will hardly be considered as a grievance." (Emphasis added in second and third sentences.)

The cases dealing with the Guaranty Clause, discussed in *Baker* v. *Carr*, do not offer much hope for having that Clause affirmatively enforced by this Court. But if it may not be used as a sword for affirmative relief it could still serve as a shield, to preserve rights not granted to the States but *guaranteed* to them.

In conclusion, we respectfully urge here that the system of representation we support is a rational, republican form of government for the States as well as the Federal govern-

ment.[20] The fact that the system finally evolved for the National government to some extent as a matter of compromise does not deprive that system of its rational, sensible characteristics. It does not matter if these characteristics were contemporaneously recognized, which was the case, or urged on grounds of political expediency or political philosophy, which was the case, or whether these characteristics were later used to encourage acceptance of the

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[20] The report of the Advisory Commission on Inter-governmental Relations, *Apportionment of State Legislatures*, at p. 42 states:

> "It may well be that a strict 'federal plan' of representation would produce a rational system of representation in the legislatures of some States."

In 1955 the constitutions of at least eleven national governments had legislative bodies patterned after our Federal system, that is, a bicameral legislature with representation in one house on the basis of population and in a second house on the basis of subdivisions of the national state, without regard to population. *Peaslee, Constitutions of Nations*, 2d ed. (1956). See Constitutions of *Argentina* (2 Senators for each province and 2 for the capital, *id.* Vol. I, p. 57); *Australia* (6 Senators for each of the original States, id., Vol. I, p. 80); *Bolivia* (3 Senators for each department, *id*, Vol. I, p. 188); *Brazil* (3 Senators for each of the States and 3 for the federal district, *id*, Vol. I, p. 207); *Republic of Cuba* (9 Senators for each of the 6 provinces, *id*, Vol. I, p. 632); *Dominican Republic* (1 Senator for each province and for the District of Santo Domingo, *id*, Vol. I, p. 753); *Equador* (2 Senators for each province, 1 for the Galapagos Islands, *id*, Vol I, p. 685); *Mexico* (2 Senators for each State and 2 for the Federal District, *id* Vol. II, p. 679—in the Chamber of Deputies each state must have at least 2 deputies and each territory at least one, *id*, Vol. II, p. 659); *Switzerland* (2 Deputies per Canton, *id*, Vol. III, p. 327); *Union of South Africa* (8 Senators for each province and 8 nominated by the Governor-General-in-Council, *id*, Vol. III, p. 443-444); and *Venezuela* (2 Senators for each State and the Federal District, *id*, Vol. III, p. 713). With the possible exception of Switzerland, we believe that none of these national governments was compelled to compromise with its subdivisions in order to form a federal union of sovereign states.

system or later described to explain the rightness or the success of the system in its operation. That a plan is evolved as a means of compromise does not mean that it is arbitrary, that it is without sense or reason. It is not irrational for a wagon driver, when going down hill, to have one hand on the brake as he applies his whip to the horse. An engine and a brake serve seemingly inconsistent purposes, but it is not irrational to put both in an automobile, or in legislative system.

CONCLUSION

It is respectfully submitted that a State bicameral legislature consisting of one house in which representation is according to population and a second house in which subdivisions of the State are accorded representation, without apportionment according to population, is a rational, republican form of government guaranteed by the United States Constitution and not offensive to the Fourteenth Amendment.

Respectfully submitted,

ARTHUR J. SILLS,
Attorney General of New Jersey,

ROBERT W. PICKRELL,
Attorney General of Arizona,

Of Counsel and On the Brief:

THEODORE I. BOTTER,
First Assistant Attorney General
of New Jersey,

HOWARD H. KESTIN,
CHARLES J. CASALE, JR.,
Law Assistants of New Jersey.

[ADDITIONAL LIST OF ATTORNEYS GENERAL APPEARS ON FOLLOWING PAGE]

DUKE W. DUNBAR,
Attorney General of Colorado,

BERT T. KOBAYASHI,
Attorney General of Hawaii,

ALAN G. SHEPARD,
Attorney General of Idaho,

EDWIN K. STEERS,
Attorney General of Indiana,

WILLIAM M. FERGUSON,
Attorney General of Kansas,

JACK P. F. GREMILLION,
Attorney General of Louisiana,

T. WADE BRUTON,
Attorney General of North Carolina

HELGI JOHANNESON,
Attorney General of North Dakota,

WALTER E. ALESSANDRONI,
Attorney General of Pennsylvania,

J. JOSEPH NUGENT,
Attorney General of Rhode Island,

FRANK J. FARRAR,
Attorney General of South Dakota,

CHARLES GIBSON,
Attorney General of Vermont,

Amici Curiae.

APPENDIX A

Principles of Representative Government Expressed in the Federal Constitutional Convention of 1787

This abstract endeavors to present the principal views or contentions of various delegates and factions at the Constitutional Convention of 1787 on the subject of representative government and the development of the provisions of the Federal Constitution dealing with the National Legislature. An effort has been made to present views that are representative of the proceedings and the debates, with little interpretative comment of our own. However the details of all legislative plans which were proposed are not fully set forth.

Included are the views expressed by delegates of the larger and the smaller states in their conflict over the extent to which popular, proportional representation should be reflected in each house of the National Legislature. We may not have afforded equal space to the viewpoints of conflicting groups. Special emphasis has been given to the expression of views by delegates in various camps concerning the need to protect minority rights.

And because of the current controversy over the extent to which the "Federal analogy" is applicable to the composition of state legislatures, we have included some of the many instances in which delegates to the Federal Convention drew analogies between the plan they urged and state plans, the relationship between states and counties, as well as analogies to forms of representative government in other countries.

Except as otherwise noted below, all references are to various pages of Volume I of *The Records of the Federal Convention* (Farrand, ed., 1911), the Notes of Madison, which are the most complete of all the notes taken by delegates at the convention.

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May 14. Delegates began arriving at Philadelphia. On May 25 George Washington was chosen as Chairman, and on May 28 the delegates adopted convention rules. Full delegations from all eleven states did not arrive until June 2nd. Delegates from New Hampshire arrived on July 23, but no delegates from Rhode Island ever attended.

May 29. Governor Randolph of Virginia opened the business of the convention. At p. 24, Notes of McHenry. He spoke of the weaknesses under the Articles of Confederation, describing the existing government as follows:

> a. It produced no security against foreign invasion, Congress having no power to prevent war, to raise money for a military force or to punish infractions of treaties with foreign nations;
>
> b. It had no power to check quarrels between states;
>
> c. It could not levy tariffs;
>
> d. It could not defend itself against encroachments from the states and was not paramount to the state constitutions. At p. 18.

Randolph presented at the very outset of the convention a series of 15 separate resolutions which together formed a proposal for creating an entirely new structure of government. At pp. 19-22. The Randolph resolutions, commonly referred to as the Virginia Plan, were to be championed by delegates from the three larger states, Virginia, Pennsylvania and Massachusetts, as well as from other states, such as South Carolina and Georgia, whose delegates assumed a rapid growth of those states. At p. 491; and at page 500, Notes of Yates. Since his plan was urged by the advocates of popularly elected representatives who sought to insure the rule of the majority, it

is interesting to note that Randolph, at the very beginning recognized the problem of protecting the interests of the minority. He spoke of his hopes for the success of the convention, but, before even introducing his plan, according to the Notes of McHenry, Governor Randolph warned against the excesses of democracy. He said:

> "Our chief danger arises from the democratic parts of our constitutions. It is a maxim which I hold incontrovertible, that the powers of government exercised by the people swallows up the other branches. None of the constitutions have provided sufficient checks against the democracy. The feeble Senate of Virginia is a phantom, Maryland has a more powerful senate, but the late distractions in that State, have discovered that is is not powerful enough. The check established in the constitution of New York and Massachusetts is yet a stronger barrier against democracy, but they all seem insufficient." At pp. 26, 27, Notes of McHenry.

The legislative plan proposed by Governor Randolph consisted of a National Legislature of two branches, "to be proportioned to the Quotas of contribution, or to the number of free inhabitants, as the one or the other rule may seem best in different cases." The "members of the first branch of the National Legislature ought to be elected by the people of the several States ***." The "members of the second branch of the National Legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual Legislatures *** to hold their offices for a term sufficient to ensure their independency ***." At p. 20.

Randolph further proposed that there be a National Executive to be chosen by the National Legislature, as well as a National Judiciary, also to be chosen by the

National Legislature. He further proposed that, "a Republican Government and the territory of each State, except in the instance of a voluntary junction of Government and territory, ought to be guaranteed by the United States to each State ***." At pp. 20-22.

May 29. The convention resolved itself into a Committee of the Whole House to which the resolutions of Governor Randolph were referred. A plan for the federal government proposed by Charles Pinckney was also referred to the Committee of the Whole. At p. 23. This plan called for a bicameral legislature composed of a Senate and a House of Delegates. Pinckney proposed that the House of Delegates be elected by the State Legislatures, and apportioned according to population, three-fifths of Negroes included. The Pinckney plan proposed that for the forming of the Senate, the United States was to be divided into "four great districts (so apportioned as to give to each its due weight)" with members to be elected by the House of Delegates "either from among themselves or the people at large." The Senate and House of Delegates were to choose the President of the United States "from among themselves or the People at large." Vol. III, pp. 605-606.

May 30. Meeting of the Committee of the Whole. The clause in Randolph's plan dealing with proportional representation in the legislature was discussed. The Delaware delegation, speaking the fears of the smaller states, challenged the authority of the convention to consider Randolph's plan, a radical departure from the Confederation, and threatened to leave. At p. 37.

Arguing in favor of representation in the national government in proportion to the population of the respective states, Madison drew an analogy between states participating in a national government and counties in a state government saying:

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"* * * as the acts of the General Government would take effect without the intervention of the State legislatures, a vote from a small State would have the same efficacy and importance as (a vote) from a large one, and there was the same reason for (different numbers) of representatives from different States, as from Counties of different extents within particular States." At p. 37.

May 31. By unanimous vote, the Committee voted in favor of a national legislature consisting of two branches. At p. 46, nt. 3. The clause in Mr. Randolph's plan calling for election of members of the first branch by the people of the several states passed by a vote of six to two. But the Committee rejected by a vote of 7 to 3 the clause calling for election of members of the second branch by those of the first. (Emphasis added). At p. 46, Journal.

During the debate Mr. Sherman of Connecticut opposed the principle of election by the people, preferring election by the state legislatures. Mr. Gerry of Massachusetts said, "The evils we experience flow from the excess of democracy." He added that he was still "republican", but "had been taught by experience the danger of the levilling (sic.) spirit." At p. 48.

Mr. Madison urged "the popular election of one branch of the national Legislature as essential to every plan of free Government." He also considered, by analogy, the composition of state legislatures in formulating a national system of government. At p. 49.

On the vote approving election of members in the first branch of the national Legislature by the people, Massachusetts, New York, Pennsylvania, Virginia, North Carolina and Georgia voted affirmatively, New Jersey and South Carolina voted against, and Connecticut and Delaware delegations divided. (Emphasis added). At p. 50.

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In discussing the composition of the second branch of the legislature Mr. Randolph did not have an opinion as to the number of its members but said, "it ought to be much smaller than that of the first; so small as to be exempt from the passionate proceedings to which numerous assemblies are liable." Mr. Randolph observed "that the general object was to provide a cure for the evils under which the United States laboured: that in tracing these evils to their origin every man had found it in the turbulence and follies of democracy: that some check therefore was to be sought for against this tendency of our Governments: and that a good Senate seemed the most likely to answer the purpose." At p. 51.

Mr. King of Massachusetts pointed out that choosing the second branch by state legislatures would be impracticable unless that branch was very numerous or the idea of proportion among the states was to be abandoned. If proportionate representation were followed in the second branch, there would have to be "80 or 100 members to entitle Delaware to the choice of one of them." At pp. 51, 52.

Again, during the debate, Mr. Madison drew an analogy to the system of representation in the State of Virginia, "where large and small counties were often formed into one district." At p. 52.

At this point, Mr. Sherman of Connecticut suggested that one member be elected by each of the State Legislatures, apparently referring to the second branch. No action was taken on this important suggestion. At p. 52.

The Committee rejected by a vote of 7 to 3 the proposal to elect members of the first branch out of nominations by the State Legislatures. At p. 52.

June 6. The Committee of the Whole again rejected a motion by Mr. Pinckey of South Carolina to change the mode of election of the first branch of the legislature from

election by the people to election by the legislatures of the several states. At p. 130, Journal. The debates on this motion reflect the varying opinions respecting the merits of a popular choice of legislatures.

Mr. Gerry of Massachusetts suggested that in England, "the people will probably lose their liberty from the smallness of the proportion having a right of suffrage." But, he aded: "Our danger arises from the opposite extreme * * *." At p. 132.

James Wilson of Pennsylvania urged that governmental authority should "flow immediately from the legitimate source of all authority"—the people. He urged that "the Legislature ought to be the most exact transcript of the whole Society. Representation is made necessary only because it is impossible for the people to act collectively." At pp. 132, 133.

Roger Sherman of Connecticut urged a balance in authority between the national government and state governments, with the rights of the people preserved by electing state legislatures who in turn would have the power to elect representatives to the national government. At p. 133.

Col. Mason of Virginia compared the Confederacy, where Congress represented the states, not the people of the states, with new plans of government where people would be represented directly and should, therefore, choose their representatives. At pp. 133-134.

Mr. Madison's comment during this discussion recognizes the need to temper in some fashion the principle of majority rule so as to protect the rights of the minority. He urged that, "an election of one branch at least of the Legislature by the people immediately" was necessary for better representation of the people as well as to avoid too much control of the national government by state governments. But he recognized that:

> "In all cases where a majority are united by a common interest or passion, the rights of the minority

are in danger. What motives are to restain them?" At pp. 134-135.

Madison observed that the source of oppression in relations between the parent cities of Rome, Athens and Carthage and their respective provinces was that the cities possessed the power and abused their inferiors. He observed further:

> "What has been the source of those unjust laws complained of among ourselves? Has it not been the real or supposed interest of the major number? Debtors have defrauded their creditors. The landed interest has borne hard on the mercantile interest. The Holders of one species of property have thrown a disproportion of taxes on the holders of another species. *The lesson we are to draw from the whole is that where a majority are united by a common sentiment and have an opportunity, the rights of the minor party become insecure.* In a Republican Govt. the Majority if united have always an opportunity. The only remedy is to enlarge the sphere, and therby divide the community into so great a number of interests and parties, that in the 1st. place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2d. place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and with that view to frame a republican system on such a scale and in such a form as will controul all the evils which have been experienced." (Emphasis added). At pp. 135-136.

Mr. Dickinson of Delaware urged that one branch should be chosen by the people and the other branch by the legislatures of the states. He urged:

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"In the formation of the Senate we ought to carry it through such a refining process as will assimilate it as near as may be to the House of Lords in England." At p. 136.

He urged that the Senate should be given independence by election irrevocable for terms of 3, 5 or 7 years.

William Pierce of Georgia urged that the different modes of election of members in the separate branches of the legislature would afford representation of the citizens of various states both "individually" and "collectively". At p. 137.

It appears that at one point that George Read of Delaware suggested that the idea of preserving state governments should be abandoned. At p. 137. Speaking to the general question before the Committee of the Whole, Mr. Butler of South Carolina said that he was against, "determining the mode of election until the ratio of Representation is fixed—if that proceeds on a principle favorable to wealth as well as numbers of Free Inhabitants, I am content to unite with Delaware (Mr. Read) in abolishing the State Legislatures, and becoming one Nation instead of a confederation of Republics." At p. 144, Notes of King.

June 7. The Committee of the Whole considered the method for choosing members of the second branch of the legislature. Various proposals were made, including election (a) by popular vote, (b) by state legislatures, (c) by the first branch of the national legislature, and (d) by the National Executive.

Mr. Gerry of Massachusetts opposed election by the first branch because it would make the second branch dependent upon the first, "contrary to the end proposed." He opposed election by a national executive because it tended toward monarchy. He opposed election by the people because they were divided into two principal interests, the landed interest and the commercial, including stockholders. "To draw

both branches from the people will leave no security to the latter interest; the people being chiefly composed of the landed interest, and erroneously, supposing, that the other interests are adverse to it." Mr. Gerry favored election of the second branch by the state legislatures as a "check in favor of the commercial interests against the landed; without which oppression will take place, and no free Government can last long when that is the case." At p. 152.

Mr. Dickinson of Delaware spoke of the need to preserve state governments in proper balance with the national legislature so that each could serve as a check upon the other. He argued that if all power is drawn from the people at large the national government would simply "unite the 13 small streams into one great current pursuing the same course without any opposition whatever." At p. 153.

Mr. Gerry of Massachusetts drew analogy to, "some States (where) there are two Branches in the Legislature, one of which is somewhat aristocratic." He considered that this would assure "a better chance of refinement in the choice" of representatives. At p. 155. He argued against elections by districts because of impracticability and because, "small States forming part of the same district with a large one, * * * would have no chance of gaining an appointment for its citizens of merit," thus causing discord between different parts of the same district.

The resolution of Mr. Dickinson that the second branch of the national legislature be chosen by the legislatures of the states was adopted unanimously, delegates from New Hampshire and Rhode Island being absent. At p. 149, Journal.

June 8. Mr. Charles Pinckney of South Carolina moved that the legislative entitlement of states be determined by dividing the states into three classes, according to "the comparative importance of each State, at fixed periods",

the first class to elect three members, the second class, two members, and the third class, one member each. The committee adjourned without taking a vote on the resolution.

On this date, however, the conflict of feelings between small and large states was expressed in the debate concerning the clause giving the national legislature "a negative" on such laws of the state as might be contrary to the articles of the union or of treaties with foreign nations. Mr. Madison spoke in favor of this power. Mr. Gunning Bedford, Jr. of Delaware voiced the fears of the small states that "may be injured at pleasure without redress." He urged that the power was meant "to strip the small States of their equal right of suffrage," arguing that Delaware would have a representative share of 1/90th in the "General Councils" while Pennsylvania and Virginia "would possess 1/3 of the whole." He argued:

> "Is there no difference of interests, no rivalship of commerce, of manufacturers? Will not these large States crush the small ones whenever they stand in the way of their ambitions or interested views. This shows the impossibility of adopting such a system as that on the table, or any other founded on a change in the principle of representation * * *. It seems as if Pennsylvania and Virginia by the conduct of their deputies wished to provide a system in which they would have an enormous and monstrous influence." At p. 167.

The Proposal to extend the negative power of the national government over state laws was defeated by a vote of 7 against, 3 in favor and one delegation, Delaware, divided. The three large states, Massachusetts, Pennsylvania and Virginia, voted in favor of this national power. At p. 168.

June 9. At this session of the Committee William Paterson and David Brearly, both of New Jersey, moved to resume the discussion of representation in the National Legis-

lature. Brearly suggested "that a map of the United States be spread out, that all the existing boundaries be erased, and that a new partition of the whole be made into 13 equal parts." At p. 177.

In introducing the discussion on the motion Brearly contended that the problem of representation was properly settled at the time of forming the Confederation by allowing each state an equal vote. "Otherwise the smaller States must have been destroyed instead of being saved." Although he conceded that the "substitution of a ratio * * * carried fairness on the face of it" he contended that "on a deeper examination" it was "unfair and unjust." Brearley also argued that because of the disparity of the states, "by the quota of Congress Virginia would have 16 votes, and Georgia but 1. A like proportion to the others will make the whole number ninety. There will be 3 large states and 10 small ones." He contended that the large states, Massachusetts, Pennsylvania and Virginia, "will carry everything before them." At p. 176-177. Brearly argued further:

> "Virginia with her sixteen votes will be a solid column indeed, a formidable phalanx. While Georgia with her Solitary vote, and the other Little states will be obliged to throw themselves constantly into the scale of some large one, in order to have any weight at all." At. p. 177.

Paterson considered "the proposition for a proportional representation as striking at the existence of the lesser States." At p. 177. He argued further as follows:

> "He said there was no more reason that a great individual State contributing much, should have more votes than a small one contributing little, then that a rich individual citizen should have more votes than an indigent one. If the rateable property of A was to

> that of B as 40 to 1 ought A for that reason to have 40 times as many votes as B. Such a principle would never be admitted, and if it were admitted would put B entirely at the mercy of A. As A has more to be protected than B so he ought to contribute more for the common protection. The same may be said of a large State which has more to be protected than a small one. Give the large States an influence in proportion to their magnitude, and what will be the consequence? Their ambition will be proportionally increased, and the small States will have everything to fear." At p. 178.

Paterson made it clear that New Jersey would never confederate on the plan which was before the Committee. "She would be swallowed up. He had rather submit to a monarch, to a despot, than to such a fate." At p. 179.

James Wilson of Pennsylvania argued the case for proportional representation, contending that "as all authority was derived from the people, equal numbers of people ought to have an equal number of representatives, and different numbers of people different numbers of representatives." He also observed that in districts as large as the States, the number of people was "the best measure of their comparative wealth. Whether therefore wealth or numbers were to form the ratio it would be the same." At p. 179-180. He noted Mr. Paterson's admission that persons, not property, should be the measure of suffrage, and argued:

> "Are not the citizens of Pennsylvania equal to those in New Jersey? does it require 150 of the former to balance 50 of the latter? Representatives of different districts ought clearly to hold the same proportion to each other, as their respective constituents hold to each other." At p. 180.

Hugh Williamson of North Carolina drew an analogy to the composition of state legislatures, comparing the differ-

ent states in the federal union "to Counties of different sizes within the same State: observing that proportional representation was admitted to be just in the latter case, and could not therefore be fairly contested in the former." At p. 180.

Because of the importance of the issue, a decision was postponed.

June 11. At this next meeting of the Committee of the Whole, important decisions were reached. It was at this session that Mr. Sherman of Connecticut proposed the Connecticut Plan which was ignored at this time but which later came to be adopted, specifically that the first branch of the legislature should be composed of members elected according to the respective numbers of free inhabitants and that in the second branch, or Senate, each State should have one vote and no more. At pp. 192-195, 196.

The action taken by the Committee was as follows:

a. That the first branch of the Legislature should be composed not according to the rule established in the Articles of Confederation, but according to some "equitable ratio of representation" carried by a vote of 7 to 3, New York, New Jersey and Delaware voting in the negative, with one delegation, Maryland, divided.

b. James Wilson's motion that the "equitable ratio of representation" in the first branch should be in accordance with the whole number of white citizens and three-fifth of other inhabitants except Indians not paying taxes carried by a vote of 9 to 2, New Jersey and Delaware in the negative.

c. On Sherman's motion that in the second branch of the Legislature each state shall have one vote, the Committee voted six against and five in the affirmative. The three largest states plus North Carolina, South Carolina and Georgia voted in the negative.

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d. The motion of Wilson that the second branch of the Legislature be composed according to the rule established for the first branch was carried by a vote of 6 to 5, the states dividing as on the preceding proposition.

In urging the Connecticut plan, Mr. Sherman argued that states should be in a position to protect themselves, otherwise a few large states would rule the rest. He drew a comparison between the House of Lords in England and the House of Commons. At p. 196.

Benjamin Franklin spoke of the bitterness of the debate on the issue of representation. He favored proportionate representation and rule by the majority of members, not by the majority of states. He spoke of the unwillingness of the larger states to have their property left to the disposition of the smaller and of the fear of the smaller states that their futures would be controlled by the larger states. Referring to the proposition of an "honorable gentlemen" from New Jersey, that of equalizing the states by disregarding borders and beginning anew, he found it impracticable, because it would mean, for example, giving part of Pennsylvania to New Jersey and another part to Delaware. This adjustment, although producing equality at the outset, would require continuous changes and divisions to maintain equal proportions of inhabitants. At p. 199.

Accordingly, Benjamin Franklin proposed an equitable solution as follows:

"Let the weakest State say what proportion of money or force it is able and willing to furnish for the general purposes of the Union.

"Let all the others oblige themselves to furnish each an equal proportion.

"The whole of these joint supplies to be absolutely in the disposition of Congress.

"The Congress in this case to be composed of an equal number of Delegates from each State:

"And their decisions to be by the majority of individual members voting.

"If these joint and equal supplies should on particular occasions not be sufficient, let Congress make requisitions on the richer and more powerful States for farther aids, to be voluntarily afforded, leaving to each State the right of considering the necessity and utility of the aid desired, and of giving more or less as it should be found proper." At pp. 199-200.

In urging that a vote be taken on his motion for one vote per state in the second branch of the Legislature, Mr. Sherman said:

"Everything * * * depended on this. The smaller States would never agree to the plan on any other principle (than an equality of suffrage in this branch * * *) * * *." At p. 201.

June 13. The Committee of the Whole voted to submit the Virginia Plan as amended for consideration by the Convention and the Committee then adjourned. The plan called for a National Legislature of two branches, the members of the first branch to be elected by the people of the several states, those of the second branch to be elected by the individual legislatures; representation in the first branch being according to an equitable ratio in proportion to the whole number of white and other free citizens and inhabitants and 3/5 of all other persons except Indians not paying taxes, and representation in the second branch to be according to the same rule established for the first. The resolutions also provided, "that a republican constitution, and its existing laws, ought to be guaranteed to

each State by the United States," and that the national legislature was empowered to negative all laws passed by the several states contravening the articles of union or any treaties subsisting thereunder. At pp. 224-227, *Journal.*

June 15. The Virginia Plan as reported by the Committee of the Whole was recommitted for further consideration by the Committee along with the New Jersey Plan as offered on this date by William Paterson. This latter proposal constituted the small states' reply to the Virginia Plan. It was based upon the alleged belief that the delegates were not authorized to propose so drastic a revision in the form of government as that embodied in the Virginia Plan, and it provided for a preservation of the basic structure of government under the Articles of Confederation, while substantially augmenting its powers, both external and internal.

The footnote to Madison's notes, probably added some time subsequent to the taking of the notes, shows the hardening of the position taken by the smaller states. According to Madison, Connecticut and New York were against a departure from the basic principles of the Confederation, preferring to strengthen the powers under the Confederation rather than substitute a national government. New Jersey and Delaware were strongly opposed to proportional representation in national government. At least one representative from Maryland shared these views. This opposition began "to produce serious anxiety for the result of the Convention. — Mr. Dickinson said to Mr. Madison *You see the consequences of pushing things too far.*" Some of the members from the small States who desired a National Government simply would not "be thrown under the domination of the large States." At p. 242. (Emphasis added.)

June 16. The debate continued over a choice between the New Jersey Plan merely to strengthen the Articles

of Confederation and the Virginia Plan for a national government with proportional representation in both Houses.

June 18. The Committee of the Whole met to continue consideration of both plans. Alexander Hamilton, whose views differed with those of his fellow delegates from New York who sided with the smaller states, declared that he was opposed to any plan which sought simply to strengthen the Articles of Confederation. Hamilton proposed, instead, a strong national government with a Chief Executive and members of the Senate elected to serve for life, during good behavior. Laws of any state could be voided by laws of the United States and, "the better to prevent such laws" of the states being passed, the Governor or President of each state "shall be appointed by the General Government and shall have a negative upon the laws about to be passed in the State * * *." At pp. 291-293. In the Notes of Yates, at p. 300, Hamilton himself is quoted as saying that some might say he was proposing "an elective monarchy."

June 19. Madison made a vigorous plea to the Committee to work toward an effective National Government. He recognized the problem of representation as the key stumbling block. This issue was whether "it would not be *just to allow Virginia* which was 16 times as large as Delaware an equal vote only" as against the question whether "it would not be *safe for Delaware* to allow Virginia 16 times as many votes." At p. 321. He further noted the prospect of new western states coming into the Union with few inhabitants and that if they were given an equal vote "a more objectionable minority than ever might give law to the whole." At p. 322.

Rufus King of Massachusetts pointed out that states were not "sovereigns" in the sense contended for by some. "They could not make war, nor peace, nor alli-

ances, nor treaties. * * * If the States therefore retained some portion of their sovereignty, they had certainly divested themselves of essential portions of it." At pp. 323-324.

Alexander Martin said "he could never accede to a plan that would introduce an inequality and lay 10 States at the mercy of Virginia, Massachusetts and Pennsylvania." At p. 324.

Following the debate, further consideration of the New Jersey plan was postponed and Randolph's Virginia Plan was to be reported out without further amendment.

June 20. The delegates met in convention and took up the Randolph plan. The debate continued. Again ignored was Sherman's proposal for popular representation in one house and for equal votes by states in the other. At p. 343.

John Lansing, Jr. of New York said that he was "not authorized to accede to a system which will annihilate the state governments, and the Virginia plan is declarative of such extinction." At p. 345, Notes of Yates.

June 21. William Johnson of Connecticut joined in urging the Connecticut Plan as previously proposed by his colleague, Roger Sherman. At p. 363, Notes of Yates.

June 25. The Convention voted on various resolutions, and the debate on representation continued. Nathanial Gorham of Massachusetts "inclined to a compromise as to the rule of proportion. He thought there was some weight in the objections of the small states. If Virginia should have 16 votes and Delaware with several other States together 16 those from Virginia would be more likely to unite than the others, and would therefore have an undue influence. *This remark was applicable not only to States, but to Counties or other districts of the same State.* Accordingly the Constitution of Massachusetts had

provided that the (representatives of the) larger districts should not be in an exact ratio to their numbers. And experience he thought had shown the provision to be expedient." At pp. 404-405. (Emphasis added.)

June 27 to July 11. The debate in the Convention continued as to the form of representation in the Legislature.

Luther Martin of Maryland spoke for the smaller states and urged against a surrender of sovereignty by the states. He repeated the fears that with 42 out of 90 votes, Virginia, Massachusetts and Pennsylvania would win over another state and become the "complete masters of the rest. * * *" At p. 437-438.

According to the Notes of Yates, Martin stressed the concept of a federal union of states rather than a union of peoples who are already governed by state governments. He urged that: "The general government is therefore intended only to protect and guard the rights of the states as states." At p. 453.

Hugh Williamson of North Carolina argued that the smaller states would not be in danger since as "poor States, they would unable to pay in proportion to their numbers", and could combine to lay burdens upon the large states. At p. 446.

Madison argued that the rule urged by the smaller states was not just and not necessary for their safety. Again he drew an analogy to state governments: "Why are Counties of the same States represented in proportion to their numbers? Is it because the representatives are chosen by the people themselves? so will be the representatives in the National Legislature. Is it because the larger have more at stake than the smaller? * * *.

"* * * The true policy of the small States therefore lies in promoting those principles and that form of Government which will most approximate the States to the condition of Counties." At pp. 447-449.

Appendix A

Madison stressed that the National Government would have "a complete power of taxation, the highest prerogative of supremacy * * *." At p. 447. He urged that it was not necessary to secure the small states against the large because the large states would not necessarily have common interests which would impel them to combine against the small states. At p. 447.

Roger Sherman of Connecticut replied saying: "The question is not what rights naturally belong to men; but how they may be most equally and effectively guarded in Society. * * * The rich man who enters into Society along with the poor man, gives up more than the poor man, yet with an equal vote he is equally safe. Were he to have more votes than the poor man in proportion to his superior stake, the rights of the poor man would immediately cease to be secure." At p. 450.

According to the Notes of Yates, Madison, replying to the argument of Mr. Sherman, commented, consistent with the views of the smaller states and inconsistent with his earlier position:

> "In the United Netherlands, Holland governs the whole, although she has only one vote. The counties in Virginia are exceedingly disproportionate*, and yet the smaller has an equal vote with the greater, and no inconvenience arises." At p. 457.

On June 29, John Lansing, Jr. of New York moved to amend the proposal for the composition of the first branch of the legislature by providing that it shall be composed according to the rule established in the Articles of Confederation. At p. 468. This motion was defeated by a

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* Virginia Constitution 1776, Chap. II, § V, VI provided one legislative chamber based on governmental entities alone and the other chamber on a mixture of population and governmental entities.

vote of 6 to 4, with one delegation, Maryland, divided; North Carolina, South Carolina and Georgia voted with the three largest states. This somewhat regressive motion to restore the first branch of the Legislature to one vote per state as in the Confederation indicates the hardening of the position taken by the smaller states. It was becoming apparent at this point in the Convention that the large and small states, as groups, would definitely not yield to each other's proposals.

Also on June 29, William Johnson of Connecticut urged that the states be considered in two capacities, one in their political capacity and the other as districts of individual citizens, with the two ideas combined so that in one branch of the legislature the people would be represented, and, in the other, the states. At pp. 461-462.

In a conciliatory note, Madison expressed agreement with Dr. Johnson, "that the mixed nature of the Government ought to be kept in view; but thought too much stress was laid on the rank of the States as political societies." At p. 463. Madison spoke of comparative degrees of sovereignty, of the "gradation * * * from the smallest corporation, with the most limited powers, to the largest empire with the most perfect sovereignty." At pp. 463-464. He also argued that the states had already surrendered part of their sovereignty in the Confederation and that under the proposed National Government their powers "will be much farther reduced." At p. 464.

Oliver Ellsworth, also of Connecticut, urged that the concept of one vote for each state "would become a ground of compromise with regard to the second branch", and he moved accordingly. He said:

> "We were partly national; partly federal. The proportional representation in the first branch was conformable to the national principle and would secure the large States against the small. An equality of voices

was conformable to the federal principle and was necessary to secure the small States against the large. He trusted that on this middle ground a compromise would take place." At p. 468.

Alexander Hamilton observed on June 29: "• • • *individuals forming political Societies modify their rights differently, with regard to suffrage.* Examples of it are found in all the States." (In this connection, he noted property qualifications for voting, as well as the division of a state into different districts of different size, saying that this caused "no considerable inconvenience in New York") (Emphasis added.) At pp. 465-466.

Hamilton also observed candidly:

"The truth is it is a contest for power, not for liberty." At p. 466.

And he further noted that:

"Strict representation is not observed in any of the state governments. The senate of New York are chosen by persons of certain qualifications, to the exclusion of others." At pp. 472-473, Notes of Yates.

The Notes of Yates quote Madison as urging that the small states need not fear a combination of the large states along lines of common interest but rather: "The great danger to our general government *is the great southern and northern interests of the continent, being opposed to each other. Look to the votes in congress, and most of them stand divided by the geography of the country, not according to the size of the states.*" At p. 476.

On the following day, June 30, Madison repeated this argument saying that the "great division of interests in the United States" was not along lines of the size of states but rather because of (a) climate and (b) "principally

from (the effects of) their having or not having slaves * * *." He argued that the division would not lie between large and small states but: "it lay between the Northern and Southern, and if any defensive power were necessary, it ought to be mutually given to these two interests." At p. 486.

On this same day, James Wilson of Pennsylvania argued that smaller states contend for a rule which would permit 7 of the states to control the remaining 6 although the 7 represented the weight of 24 as to 90 according to population. At p. 482. He urged that the government was being formed for *men*, not "for the imaginary beings called States." At p. 483.

Mr. Ellsworth of Connecticut replied that the minority did not rule the majority as contended by Mr. Wilson but that "the power is given to the few to save them from being destroyed by the many." He noted that he did not contend for an equal number of votes for all states in both branches of the legislature. He stressed that it was not "novel" that "the few should have a check on the many," referring to the House of Lords, the representatives of a small proportion of a nation, as serving as a check on the Commons. At p. 484.

Here Mr. Madison replied to Mr. Ellsworth saying:

> "It was urged, he said, continually that an equality of votes in the second branch was not only necessary to secure the small, but would be perfectly safe to the large ones whose majority in the first branch was an effectual bulwark. But notwithstanding this apparent defence, the Majority of States might still injure the majority of people. 1. they could *obstruct* the wishes and interests of the majority. 2. they could *extort* measures, repugnant to the wishes and interest of the majority. 3. they could *impose* measures adverse thereto; as the second branch will probably ex-

> ercise some great powers, in which the first will not participate." At p. 486.

Madison "admitted that every peculiar interest whether in any class of citizens, or any description of States, ought to be secured as far as possible." But it is here that he contended that the differences in States were not in terms of size but in terms of climate and slavery. At p. 486.

William Davie of North Carolina argued that establishing proportional representation in the Senate would be impracticable because it would require 90 members at the outset and additional members as new states were added. This would produce too large a body for the qualities it should possess. At p. 487. Mr. Davie suggested "that in general there were extremes on both sides. We were partly federal, partly national in our Union." At p. 488.

Mr. Wilson conceded that a small senate was preferable, but continued to urge proportionate representation according to the number of inhabitants in each state. At p. 488.

Benjamin Franklin summarized the diversity of opinion as follows:

> "* * * If a proportional representation takes place, the small States contend that their liberties will be in danger. If an equality of votes is to be put in its place, the large States say their money will be in danger. When a broad table is to be made, and the edges (of planks do not fit) the artist takes a little from both, and makes a good joint. In like manner here both sides must part with some of their demands, in order that they may join in some accommodating proposition. * * *" At p. 488.

Benjamin Franklin then proposed a compromise so as to give each state equal voting power in the election of national officers and on all questions wherein its sovereignty could be affected or its authority over its own citizens di-

minished. At p. 489. This proposal did not gain any support. However, it represents one of the points in the debate at which an effort is made to recognize the demands of the smaller states and to achieve some measure of compromise.

Mr. Bedford spoke of the ambition and avarice of political societies, and that this should be recognized in the formation of a government. He referred to Great Britain and to the inequality of representation in its government. He also referred to the boroughs which have "held fast their constitutional rights." He asked, "are we to act with greater purity than the rest of mankind?" At p. 491.

Mr. Bedford stated further:

> "An exact proportion in the Representation is not preserved in any one of the States." At p. 491.

Mr. Bedford expressed his fears that the three large states had a common interest to bind themselves together in commerce and asserted that whether this or other combinations occurred, in either case the smaller states would be ruined. At p. 491. The debate of June 30th closed with remarks by Rufus King of Massachusetts who said he did not think "a full answer had been given to those who apprehended a dangerous encroachment on their jurisdictions." He urged that "Expedients might be devised as * * * would give them all the security the nature of things would admit of." He admitted the propriety of securing the rights of states in the National Constitution. At pp. 492-493.

At the outset of the Convention session on Monday, July 2, a motion was made to pass the resolution providing for one vote for each state in the second branch of the legislature. The motion was defeated on a 5 to 5 vote, one state divided. (New Hampshire and Rhode Island were not voting and not represented.) On this vote, Massachusetts, Pennsylvania, Virginia, North Carolina and South Caro-

lina were in the negative. Connecticut, New York, Delaware, New Jersey and Maryland were in the affirmative and Georgia was the divided delegation. At pp. 509-510.

It was then decided to refer this matter to a Grand Committee composed of one member from each state. Most of the delegates favored this proposal. It was clear that very few, if any, were willing to allow the convention to founder and that a compromise was desired.

During the discussion on the question to commit, Gouverneur Morris, of New York, who had recently returned to the Convention after a long absence, theorized that the two houses of the legislature should be not only independent of each other but should really be adverse. As such, since the first branch was to be constituted according to popular representation, the second should consist of representatives of the wealthy class to serve for life. He noted that the wealthy people had a very substantial interest which deserved protection and that they should at least be given a place in the government by virtue of their position. At pp. 511-514.

The Grand Committee met on Tuesday, July 3, and appears to have completed its business on that one day. Yates' notes of the Committee's deliberations are as follows (at pp. 522-523):

> "The *grand committee* met. Mr. Gerry was chosen chairman.
>
> "The committee proceeded to consider in what manner they should discharge the business with which they were entrusted. By the proceedings of the convention they were so equally divided on the important question of *representation in the two branches*, that the idea of conciliatory adjustment must have been in contemplation of the house in the appointment of this committee. But still how to effect this salutory purpose was the question. Many of the members, impressed with the

utility of a general government, connected with it the indispensable necessity of a representation from the states *according to their numbers and wealth;* while others, equally tenacious of the rights of the states, would admit of no other representation but such *as was strictly federal,* or in other words, *equality of suffrage.* This brought a discussion of the principles on which the house had divided, and a lengthy recapitulation of the arguments advanced in the house in support of these opposite propositions. * * *"

"These remarks gave rise to a motion of Dr. Franklin, which after some modification was agreed to, and made the basis of the following report of the committee.

"The committee to whom was referred the eighth resolution, reported from the committee of the whole house, and so much of the seventh as had not been decided on, submit the following report:

"That the subsequent propositions be recommended to the convention, on condition that both shall be generally adopted.

"That in the first branch of the legislature, each of the states now in the union, be allowed one member for every 40,000 inhabitants, of the description reported in the seventh resolution of the committee of the whole house— That each state, not containing that number, shall be allowed one member.

"That all bills for raising or apportioning money, and for fixing salaries of the officers of government of the United States, shall originate in the first branch of the legislature, and shall not be altered or amended by the second branch; and that no money shall be drawn from the public treasury, but in pursuance of appropriations to be originated in the first branch.

Appendix A

"That in the second branch of the legislature, *each state shall have an equal vote.*" At pp. 522-523.

It is apparent from the recommendations of this committee that the large and wealthier states were most worried about subjecting their wealth to the control of the smaller states. Apparently it satisfied at least the members of the Grand Committee and eventually the whole Convention that if fiscal bills were to originate in the popular branch the major interest of the larger states would be sufficiently protected, even though the prohibition against amendment by the Senate was later deleted.

When the convention met two days later on July 5, 1787, Mr. Gerry delivered the report on behalf of the Committee. Explaining the report, Mr. Gerry, according to the notes of Madison, at p. 527, said:

> "The committee were of different opinions as well as the Deputations from which the Committee were taken, and agreed to the Report merely in order that some ground of accommodation might be proposed. Those opposed to the equality of votes have only assented conditionally; and if the other side do not generally agree will not be under any obligation to support the Report."

Substantial opposition to the report was lodged. According to his own notes (p. 527), "Mr. [Madison] could not regard the exclusive privilege of originating money bills as any concession on the side of the small states. * * *"

On July 7 the second proposition of the Grand Committee was discussed, namely, the recommendation that each state be given one vote in the second branch of the legislature. Elbridge Gerry of Massachusetts urged that this was the "critical question. He had rather agree to it than have no accommodation." At p. 550.

James Wilson of Pennsylvania still spoke against the proposal but the convention approved the words of the report by a vote of 6 to 3, with two delegations divided. Pennsylvania, Virginia and South Carolina voted against and Massachusetts and Georgia were divided. At pp. 550-551.

Gouverneur Morris of Pennsylvania argued against adoption of the proposal, urging that "it made another Congress, a mere whisp of straw," and that now there was no "check in the Senate." At pp. 551-552.

On July 9 the Convention met to hear the report of a committee of 5 members to whom the responsibility was given for drawing up a plan for the precise representation in the first house of the legislature. At p. 559. Nathaniel Gorham of Massachusetts objected to the ratio of one member for every 40,000 inhabitants. He said that this would produce too numerous a house and, secondly, that the western states might ultimately outvote the states bordering the Atlantic. He suggested that the Atlantic states, who have the government in their own hands, should deal out the right representation in safe proportions to the western states. At pp. 559-560. Mr. Williamson of North Carolina thought that the rule of numbers was acceptable, but that western states stood on a different footing and unless their property was rated as high as the property in the Atlantic states they should not have like representation. At p. 560.

Also of interest is the fact that Georgia was to be given two members on the theory that her population was rapidly increasing and would soon enfitle her to two representatives. William Paterson of New Jersey objected to an estimate based upon the combined rule of numbers and wealth (including slaves). He said that the standards were vague and that the three-fifths ratio for counting negroes indirectly encouraged the slave trade. At p. 561.

Appendix A

On July 10, the Grand Committee reported out a plan for the apportionment of members in the first branch of the legislature, to consist of 65 members. At p. 566. Numerous objections were raised to the allocation of representatives.

July 16. On Monday, July 16, the Convention finally adopted the report of the Grand Committee, including the provision that the second branch of the Legislature be constituted so that each state have an equal vote. The motion was adopted on a 5 to 4 vote, with one state divided. Pennsylvania, Virginia, South Carolina and Georgia were in the negative, with Massachusetts divided.

At this point, Governor Randolph proposed that the Convention adjourn until the following day so that the delegates from the larger states could consider the vital proposition that had just been voted upon. (Emphasis added): II Farrand at 15-19.

Madison's notes show that on the following morning, before the Convention reconvened, delegates from the larger states, and some from the smaller, met in conference to consider their position. It was apparent that delegates from the larger states could not agree among themselves uniformly to oppose the composition of the second branch of the legislature. Some delegates found it acceptable, others considered it more desirable than to have the Convention fail, and some were resolutely opposed. Id. at 19-20.

July 23. The composition of the second branch of the legislature was not discussed again until July 23, at which time *the Convention voted 10-0 to adopt the proposal that each state should elect two members to the second branch of the legislature.* (Emphasis added). Id. at 85-86. The majority of delegates from New York were

no longer present at the Convention, having left in protest on July 5, before the Convention had approved the proposal of the smaller states for the second branch of the legislature. I Farrand at 536.

The Convention went on to consider other provisions concerning the legislature, but the basic structure of the plan of representation had been established. Ultimately, Governor Randolph and George Mason of Virginia and Elbridge Gerry, of Massachusetts, declined to sign the Constitution as finally promulgated by the Convention. Their failure to do so was based on various grounds, including their objection to the composition of the legislature as finally adopted.